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The Anxiety of Influence: The Evolving Regulation of Lobbying

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The Anxiety of Influence¹: The Evolving Regulation of Lobbying

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I. The Regulation of Lobbying

A. Two Views of Lobbying

In 1843, the Pennsylvania Supreme Court warned that “already has a class of persons arisen, at the seat of the general government and elsewhere, who make it a business to . . . procure the passage of an Act of the Legislature.”² “The arts and misrepresentations” of these “designing men” raised the unsettling prospect of “mislead[ing]” members of the legislature “from the paths of duty.” The court acknowledged there was no evidence that anyone retained to persuade the state legislature had actually engaged in any misconduct, but the practice had a “tendency . . . in the hands of designing and corrupt men to improper tampering with members, and the use of extraneous, secret influence over an important branch of government.”³ The “designing and corrupt men” that so troubled the Pennsylvania court in *Clippinger v. Hepbaugh* were lobbyists, and the court’s concern that lobbying – that is, the use of paid agents to influence government action -- necessarily raises the prospect of “improper tampering” and the “use of extraneous, secret influence” to shape public policy remains a driving force shaping the legal treatment of lobbying.

Yet, courts have also long recognized that lobbying has a legitimate place in our system of representative government. As New York’s highest court observed in 1893, “[i]t must be the right of every citizen who is interested in any proposed legislation to employ an agent, for compensation payable to him, to draft his bill and explain it to any committee, or the legislature,

¹ Apologies to Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (1973).

² *Clippinger v. Hepbaugh*, 5 Watts & Serg. 315, 320-21 (Pa. 1843).

³ *Id.*

fairly and openly, and ask to have it introduced.”⁴ To be sure, the New York court emphasized that merely drafting and explaining bills to legislators and requesting their introduction did not involve asking members of the legislature actually to vote for those bills, so that such activity did not involve the “lobby services,” which the court “condemned as against public policy.” According to the court, the plaintiff was “not a lobbyist” because “he had no acquaintance or influence with any member of the legislature, and it does not appear that he had any peculiar facilities for procuring legislation.”⁵ Today, however, we would certainly view the efforts of a hired agent to draft a bill, explain it to legislators, and seek the bill’s introduction as lobbying.

The law of lobbying grows out of the tension between these two views of lobbying – what might be called the “good” lobbying, that is, the preparation and explanation of legislation, regulation, or policy proposals to advance the interests of members of the public; and the “bad” lobbying, such as the use of “extraneous, secret influence,” “peculiar facilities,” and “tampering” with legislators. In the public’s mind, the “bad” vision of lobbying clearly dominates the “good” one. Lobbyists like the notorious Jack Abramoff⁶ have featured prominently in scandals involving members of Congress, and candidates and elected officials compete to denounce lobbyists and to decry lobbyists’ influence on government. Lobbying has become a “very dirty word,”⁷ a virtual synonym for corruption. Indeed, the term is so toxic that the American League of Lobbyists – the lobbyists’ trade association -- dropped “lobbyist” from its name and is

⁴ Chesebrough v. Conover, 140 N.Y. 382, 387 (1893).

⁵ Id.

⁶ Jack Abramoff was a politically powerful Washington lobbyist from the mid-1990s until his activities came under federal scrutiny starting in 2004. As the United States Court of Appeals for the District of Columbia Circuit observed, the Department of Justice investigation into his activities “unearthed evidence of corruption so extensive that it ultimately implicated more than twenty public officials, staffers and lobbyists.” *United States v. Ring*, 706 F.3d 460, 463 (D.C. Cir. 2013). See also *United States v. Safavian*, 649 F.3d 688 (D.C. Cir. 2011) (affirming conviction of General Services Administration chief of staff who accepted a golf trip to Scotland from Abramoff).

⁷ Dan Eggen, “In midterm elections, Washington lobbying becomes a line of attack for both parties,” *Washington Post*, Oct. 6, 2010.

now the “Association of Government Relations Professionals.”⁸ But legal doctrine also reflects a recognition of the “good” lobbying – the right of individuals, groups, organizations, businesses, nonprofit associations, states and local governments,⁹ unions and other groups on their own or through paid representatives to seek to influence government action. Like campaign finance, lobbying is an essential part of modern democracy that simultaneously triggers deep-seated concerns about the impact of private wealth and special interests on public policy. Again like campaign finance, lobbying regulation strives to hold together the differing and sometimes conflicting goals of protecting constitutional rights of speech, association, and petition; controlling undue influence and improper efforts to shape government decision-making; and promoting the transparency of the political process. Indeed, lobbying and campaign finance regulation are increasingly linked, as reformers, lawmakers, and academics have begun to give greater attention to the lobbying-campaign finance nexus.

Lobbying is a big business. At the federal level, lobbyists reported spending approximately \$3.5 billion a year during the 2009-12 period.¹⁰ There is also extensive lobbying at the state and local level. Lobbying expenditures with respect to the New York state

⁸ See Megan R. Wilson, “K Street group strikes ‘lobbyist’ from name,” The Hill, Nov. 18, 2013, <http://thehill.com/business-a-lobbying/business-a-lobbying/190639-k-street-group-strikes-lobbyist-from-name>.

⁹ See, e.g., Andrew Doughman, “Local governments spend \$3 million to lobby Legislature – for tax increases,” Las Vegas Sun, July 24, 2013, <http://www.lasvegassun.com/news/2013/jul/24/local-governments-spend-3-million-lobby-legislatur/>; “Local governments lobby Minnesota Legislature with \$7.8 million in 2012,” Sctimes.com, July 17, 2013, <http://www.sctimes.com/viewart/20130717/NEWS01/307170049/Local-governments-lobby-Minnesota-Legislature-7-8-million-2012>; Brian M. Rosenthal, “Local governments spend big to lobby Legislature,” The Seattle Times, June 18, 2013 (government entities – cities, counties, ports, Native American tribes, public utility districts and school districts – were the biggest category of lobbying spenders in Washington state), http://seattletimes.com/html/localnews/2021218481_governmentlobbyingxml.html.

¹⁰ See OpenSecrets.org, “Lobbying Database,” <http://www.opensecrets.org/lobby>. Total reported federal lobbying spending was \$3.50 billion in 2009, \$3.55 billion in 2010, \$3.33 billion in 2011, and \$3.30 billion. Id.

government, for example, are running at more than \$200 million per year.¹¹ These numbers almost certainly understate actual lobbying expenditures. At the federal level, a significant fraction – perhaps as much as half -- of “people currently employed as policy advocates” in Washington do not register as lobbyists¹² but instead, like former House Speaker Newt Gingrich, claim only to be giving “historical advice,”¹³ or, more commonly, like former Senate Majority Leader Tom Daschle, claim to be “strategic advisers” who shape lobbying strategy behind the scenes but do not engage in the direct contact with policymakers that triggers the statutory definition of lobbying.¹⁴ Moreover, at least at the federal level, even registered lobbyists do not have to report media expenditures or social media activities intended to influence the broader political and policy environment, even though such “campaign-style advocacy” is central to contemporary lobbying.¹⁵

Lobbying is a heavily regulated activity, with both the extent and pace of regulation increasing. Congress,¹⁶ all fifty states,¹⁷ and many local governments¹⁸ have enacted laws

¹¹ See New York State Joint Commission on Public Ethics, 2012 Annual Report (2013) at 33 (reported lobbying spending was \$213 million in 2010, \$220 million in 2011, and \$205 million in 2012). Lobbying expenses with respect to the New Jersey government were a record \$65.6 million in 2010, up from \$57.6 million in 2009, see Lobbying Up, Philadelphia Inquirer, March 9, 2011, http://www.philly.com/philly/multimedia/Lobbying_in_New_Jersey.html?view=graphic.

¹² See Timothy M. LaPira and Herschel F. Thomas III, “Just How Many Newt Gingrich’s Are There on K Street? Estimating the True Size and Shape of Washington’s Revolving Door,” April 2, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241671.

¹³ During one of the debates during the 2011-12 contest for the Republican presidential nomination, former Speaker Gingrich responded to the request that he explain what he had done to earn a payment of \$300,000 from mortgage giant Freddie Mac by stating that he had not lobbied but had offered “historical advice” relevant to the mortgage crisis. See, e.g., Politico, Republican Debate: 7 Attacks on Newt Gingrich to Watch, Dec. 15, 2011, http://www.politico.com/news/stories/1211/70230_Page2.html.

¹⁴ See, e.g., Chris Frates, “Lobbyists call bluff on ‘Daschle exemption,’” Politico, July 26, 2010; Kate Ackley, “Lobbying Without a Trace,” Roll Call, March 20, 2013. See also Thomas Edsall, “The Shadow Lobbyist,” N.Y. Times, April 25, 2013, http://opinionator.blogs.nytimes.com/2013/04/25/the-shadow-lobbyist/?_r=0.

¹⁵ See, e.g., Gary Andres, “Campaign-Style Advocacy: A Broader View of Lobbying,” 11 The Forum 3 (2013); accord, Thomas B. Edsall, “The Unlobbyists,” N.Y. Times, Dec. 31, 2013, http://www.nytimes.com/2014/01/01/opinion/edsall-the-unlobbyists.html?_r=0.

¹⁶ See, e.g., 2 U.S.C. § 1601 et seq (disclosure of lobbying activities).

regulating lobbying. Many of these measures have recently been revised and updated, and new proposals for lobbying regulation, as part of government ethics or political reform packages, are frequently advanced in Congress and many state and local legislatures.¹⁹ Lobbying is also directly affected by such other measures as the Internal Revenue Code, the Foreign Agents Registration Act (FARA),²⁰ procurement laws, executive orders and internal legislative rules.

This article examines the legal framework for the regulation of lobbying. The remainder of this Part lays out the values shaping lobbying regulation and the regulatory techniques that follow from those values. Part II considers how courts, particularly the United States Supreme Court, have treated lobbying. Parts III through V then address the principal issues that are attracting the attention of legislators, are contested in litigation, or are on various reform agendas, including the campaign finance activities of lobbyists; lobbying by former government officials (the “revolving door” problem); and the scope and contents of lobbyist disclosure requirements. Part VI briefly concludes.

B. Values Driving Lobbying Regulation

The regulation of lobbying has been shaped by four principal concerns:

¹⁷ See, e.g., National Conference of State Legislatures (hereinafter “NCSL”), “Lobbyist Activity Report Requirements,” (updated January 2013)

<http://www.ncsl.org/legislatures-elections/ethicshome/50-state-chart-lobbyist-report-requirements.aspx>.

¹⁸ See, e.g., N.Y.C. Admin Code, §§ 3-211 et seq, http://www.cityclerk.nyc.gov/html/lobbying/law_admin.shtml; City of Chicago, Governmental Ethics Ordinance, §§2-156-210 et seq., Municipal Code of Chicago, <http://www.cityofchicago.org/content/dam/city/depts/ethics/general/Ordinances/GEO-Jan-2013.pdf>; Municipal Lobbying Ordinance, Los Angeles Municipal Code, §§ 48.01 et seq, http://ethics.lacity.org/PDF/laws/law_mlo.pdf.

¹⁹ For only a handful of recent examples, see Nicholas Kuznets, “IMPACT: Georgia governor signs bills limiting gifts from lobbyists,” Center for Public Integrity, May 7, 2013, <http://www.publicintegrity.org/2013/05/07/12622/impact-georgia-governor-signs-bills-limiting-gifts-lobbyists>; Nathan Shaker, “Mayor signs revision to Philadelphia Lobbying Law,” Lobby Comply Blog, Nov. 1, 2011, <http://67.39.100.124/wordpress/?p=6291>; Cy Ryan, Bill on Lobbyist Spending on Legislators Introduced, Las Vegas Sun, Mar. 1, 2011; Chris Joyner, Commission Expands Definition of Lobbyist, Atlanta Journal-Constitution, Mar. 7, 2011; Sarita Chourey, SC Lobbyists Face Tighter Restrictions, The Augusta Chronicle, Mar. 31, 2011; Beveridge & Diamond, “Expansion of the Massachusetts’ Lobbying Law May Catch Many Unaware,” 2010, <http://www.bdlaw.com/news-797.html>.

²⁰ 22 U.S.C. § 611 et seq.

(1) protection of the opportunity for individuals, groups, and organizations to lobby, that is, to present facts, arguments, and views to legislative and executive branch officials;

(2) prevention of improper influence on government action;

(3) promotion of a level playing field by restricting unfair or unequal opportunities to influence government action; and

(4) provision for the transparency of lobbyist-government official interactions.

The first concern is aimed at preventing regulations that would interfere with the ability of people to lobby or use lobbyists to inform and influence government action. Lobbying is an aspect of the freedoms of speech, press, association, and petition protected by the constitution. Lobbying can advise government officials about conditions in particular industries, geographic areas, government subunits, or socio-economic groups; the costs and benefits of proposed laws and regulations; the consequences of government actions under consideration; and the views of those affected by potential government decisions. It is a means of political expression, a form of popular participation in government, and a tool for educating government decision-making.

But if the first value of lobbying regulation is to assure that the core right to communicate with government is not abridged, the second goal reflects the concern that lobbying can be, and often has been, accompanied by inappropriate techniques inconsistent with public-regarding decision-making. Lobbying should inform and thereby improve government action, not distort it by appeals to the private self-interest of decision-makers. The principal concern here is not with the communicative aspect of lobbying per se, but with activities ancillary to communication that may improperly influence government action. To be sure there is no widely agreed-upon definition of the *proper* influences on government action – such as whether and to what extent an elected official should consider the needs or preferences of her local constituency versus the state

or nation as a whole; the implications of a vote or decision for her reelection; or the views of the leaders of her political party or her supporters in the last election. But it is generally recognized that it is improper for a public official to take an official action in exchange for, in response to, or in order to obtain a private or personal material benefit. The widespread criminal prohibitions of bribery and illegal gratuities reflect the belief that it is improper to provide officials with material benefits in exchange for, in response to, or to influence their official actions. As criminal laws, they are focused on situations in which the private benefit is closely linked a specific official act, But the concern about improper private influence on government goes beyond relatively clear cut quid pro quos. Improper influence may occur when private benefits – such as free meals, entertainment, travel, or investment opportunities – are not linked to specific official acts but are intended merely to facilitate access, provide opportunities for quasi-social interaction, smooth relations, or promote good will towards the lobbyists and the interests they represent. Even though not tied to specific official actions, such benefits can still distract government decision-makers from the public interest or skew the formation of public policy. As a result, they constitute a form of *improper* influence that may be subject to regulation.

A third goal is preventing some lobbyists from obtaining unfair or unequal influence relative to others. The concerns about improper and unfair influence overlap. If one lobbyist provides an official with a material benefit and others do not, this may constitute both improper and unfair influence. But the concern about unfair influence focuses in particular on lobbyists who, based on their past or present relationships with government officials, may have opportunities for special access to officials that are not available to other people attempting to communicate with these officials. This has been an impetus for the rules intended to limit the ability of former government officials to lobby agencies or branches of government where they

recently worked, that is, so-called “cooling off” or “revolving door” restrictions.²¹ The concern about unequal influence can also be seen underlying the laws governing the tax treatment of lobbying. Under the Internal Revenue Code, businesses may not treat lobbying expenditures as deductible ordinary and necessary business expenses,²² while a charitable organization entitled to receive tax-deductible contributions under section 501(c)(3) will forfeit that favorable tax treatment if “attempting, to influence legislation” constitutes a “substantial part” of its activities.²³ Both of these tax provisions reflect the view that deductibility is a form of government subsidy inconsistent with a level playing field for lobbying. Similarly, the Byrd Amendment,²⁴ which bars the use of funds appropriated by Congress to lobby for federal contracts, grants, loans, and cooperative agreements, reflects Congress’s concern not to subsidize some lobbying activity. To be sure, the impact of the value of preventing unequal influence is quite limited. Lobbying involves the expenditure of private funds, and different individuals, firms, groups, and organizations have widely different amounts of resources available to them. They are, thus, capable of spending widely different amounts on lobbying. In theory, equalization could be advanced by capping the spending of those with great resources or subsidizing the lobbying of those without resources. However, limits on lobbying expenditures, like limits on campaign expenditures, would run straight into the First Amendment. There is no constitutional objection to offering subsidies for lobbying, but with thousands upon thousands of

²¹ See, e.g., 18 U.S.C. § 207. For federal revolving door restrictions, *see generally* Jack Maskell, “Post-Employment, ‘Revolving Door,’ Laws for Federal Personnel,” Congressional Research Service Report for Congress, 7-5700 (Sept. 13, 2012).

²² Section 162(e) of the Internal Revenue Code, as amended by the Omnibus Budget Reconciliation Act of 1993, provides that expenses incurred in attempting to influence federal or state legislation, administrative action or referenda may not be deducted as business expenses.

²³ 26 U.S.C. § 501(c)(3).

²⁴ 13 U.S.C. § 1352.

bills, amendments, appropriations, regulations and other measures subject to lobbying each year, it is difficult to see how lobbying with respect to any specific measure or issue area could be equalized, although it would certainly be possible to provide subsidies or tax breaks to organizations that lobby on behalf of politically weak or underrepresented groups. Instead of addressing lobbying inequality generally, the level-playing-field goal tends to focus more narrowly on inequalities that flow from government action, such as the provision of government funds and tax benefits to some but not other lobbyists, or the benefits some lobbyists may obtain from prior government service.

(4) The goal of transparency is central to contemporary lobbying regulation. Indeed, with the proliferation of open meetings laws, freedom of information laws, public access to records laws, public official financial disclosure laws and other “government in the sunshine” measures, transparency has become a central focus of the regulation of government operations. Transparency can promote public understanding of how government works, enable the people to better assess government performance, seek change, and hold government accountable for its actions. Measures promoting transparency do not of their own force actually prohibit any lobbying or activities ancillary to lobbying, but they may discourage practices that are, or are likely to be perceived as, improper or unfair. As Justice Brandeis famously observed nearly a century ago, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”²⁵

It is sometimes asserted that transparency promotes public confidence in government. It is not clear if this is really the case. Greater public attention to the nitty-gritty of government operations, to the battling of party and group interests, the pulling and hauling and the wheeling

²⁵ Brandeis, “What Publicity Can Do,” *Harper’s Weekly*, Dec. 20, 1913, at 10.

and dealing inherent in legislative decision-making could be demoralizing rather than confidence-building. The dictum often (perhaps mistakenly) attributed to Bismarck that “laws, like sausages, cease to inspire respect in proportion as we know how they are made”²⁶ may be more accurate. Nevertheless, the public is surely likely to be anxious when interactions between lawmakers and lobbyists are hidden behind closed doors. As a result, transparency may be valuable in ameliorating public suspicions about lobbyist-government misconduct even if it does not produce confidence in the results of the disclosed interactions. Certainly, transparency facilitates public oversight and pressure for the adoption of reforms to address forms of improper or unfair influence that transparency may reveal.

C. Techniques of Lobbying Regulation

Lobbying regulatory techniques follow from the values driving regulation. Commitment to the petitioning, associational, and communicative activity at the core of lobbying means that lobbying per se – that is, the fact and substantive content of the advocacy of legislation, administrative action, or policy proposals – cannot be prohibited or limited in amount. As a result, one technique is, in a sense, no-regulation. Unlike, say, in campaign finance, where federal and many state laws restrict contributions to candidates or political parties, there is no restriction on the use of private funds to hire lobbyists and pay for lobbying expenditures. Indeed, even regulatory fees imposed on lobbyists as part of registration and reporting requirements have been subject to constitutional oversight; when found to be greater than necessary to cover the costs of enforcing those requirements, fees may be struck down as an

²⁶ According to Professor Fred Shapiro the quip so frequently associated with Bismarck was really first uttered by “lawyer-poet John Godfrey Saxe” in 1869, and was not generally attributed to Bismarck until the 1930s. see Fred R. Shapiro, *Quote . . . Misquote*, N.Y. Times, July 21, 2008, http://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html?_r=0.

unconstitutional tax on lobbying.²⁷

Although lobbying per se is constitutionally protected, some of the ancillary activities of lobbyists, such as the provision of private benefits to public officials, can be restricted. Gifts, free meals and entertainment, honoraria, and other private benefits to government officials may be barred outright, subject to dollar limitations, restricted under some circumstances, or required to be reported.²⁸ Recently, concern about improper influence has begun to focus on the role of lobbyists in financing election campaigns. Although campaign contributions and fundraising do not provide elected officials with personal pecuniary benefits, as the funds so provided must be used for electioneering activity, they can certainly be at least as effective in garnering the attention and gratitude of officials who have to stand for reelection or want to seek higher office as free dinners or complementary Super Bowl tickets. In addition, to reduce any temptation lobbyists may feel to engage in improper activity, many jurisdictions regulate contingent fees, primarily through prohibition but also through disclosure requirements.

The principal regulatory technique for addressing unfair or unequal influence is the cooling-off period or revolving door law. These rules vary considerably with respect to the determination of who ought to be regulated and the length and scope of the cooling-off requirement, but the central idea is that for some period of time a former government employee should be barred from lobbying the office where she used to work in order to prevent her from taking advantage of the inside information and personal contacts she acquired at that office. At

²⁷ See, e.g., *Moffett v. Killian*, 360 F. Supp. 228 (D. Conn. 1973); *Fidanque v. Oregon Standards and Practices Comm.*, 969 P.2d 376 (Ore. 1998); *ACLU of Illinois v. White*, 692 F. Supp.2d 896 (N.D. Ill. 2010).

²⁸ See, e.g., Chip Nielsen, Jason D. Kaune, and Jennie Unger Skelton, "State Lobby and Gift Laws," Practising Law Institute, 2010, 1837 PLI/Corp 597; National Conference of State Legislatures, "Ethics: Legislator Gift Restrictions Overview," Updated March 2013, <http://www.ncsl.org/legislatures-elections/ethicshome/50-state-table-gift-laws.aspx>.

the national level, the Obama Administration adopted a number of regulatory measures, reflecting both the anti-improper influence and level playing field goals of barring lobbyists from certain government positions – a “reverse revolving door” rule. Again, the underlying concern appears to be that the official will be affected by personal connections to the lobbyists with whom she used to work or the clients she used to represent, or by a psychological predisposition to be sympathetic to the positions advocated by former colleagues or clients. This might give them an unfair advantage over other firms or interest groups with a stake in the official’s government decisions.

The value of transparency is widely advanced by federal, state and local lobbying disclosure laws. Lobbyists are required to register with a designated regulator and then file periodic reports concerning their activities. The reports tend to focus on the money trail, that is, the funds paid by clients or principals to lobbyists, and the funds spent by lobbyists in the course of their representational activities. Recent regulatory measures and proposed reforms have sought to widen the scope of these reports to include, *inter alia*: the disclosure of so-called indirect spending intended to advance the lobbying agenda by persuading members of the public to contact government decision-makers; greater disclosure of the groups that fund the organization that is a lobbyist’s nominal client; and more information concerning the particular officials contacted by lobbyists and the matters discussed with them.

II. Lobbying and the Constitution

The Supreme Court’s treatment of lobbying originally focused on the problem of lobbyist contingency fees. In those series -- running from the mid-nineteenth through the early twentieth centuries -- the Court demonstrated a very low regard for lobbying. In the 1950s, however, the

Court shifted focus and determined that lobbying is protected by the First Amendment. However, even after reframing lobbying as a constitutionally protected activity, the Court has been willing to uphold some regulation of lobbying, particularly disclosure.

A. In the Beginning: The Courts and Lobbying in the Nineteenth and Early Twentieth Centuries

In November 1847, Alexander Marshall, an experienced “lobby member” before the Virginia legislature, wrote to the officials of the Baltimore & Ohio Railroad proposing that they retain him to help persuade the legislature to grant the railroad a certain right of way it wanted. Marshall’s proposal stressed the need for “an active, interested, well-organized influence” in the legislature. Marshall urged that the railroad

inspire your agents with an earnest, nay, an anxious wish for success. You must give them nothing if they fail, endow them richly if they succeed My plan would aim to place the “right-of-way” members on an equality with their adversaries [a competing railroad], by sending down a corps of agents, stimulated by an active partisanship by the strong lure of profit Under this plan you pay nothing unless a law be passed which your company will accept I have surveyed the difficulties of this undertaking, and think they may be surmounted. The cash outlay for my own expenses, and those of the subagents, would be heavy. I know the effective service of such agents as I would employ cannot be had except on a heavy contingent. I should not like to undertake the business on such terms, unless provided with a contingent fund of at least \$50,000 [or about \$1.2 million in 2013 dollars], secured to my order on the passage of a law, and its acceptance by your company.²⁹

Marshall’s proposal stressed that he “contemplate[d] the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice.”³⁰ Marshall did, however, emphasize the need to keep the arrangement secret “from motives of policy alone, because an open agency would furnish ground of suspicion and

²⁹ Marshall v. Baltimore & Ohio RR Co., 57 U.S. 314, 317-19 (1854).

³⁰ Id. at 318.

unmerited invective, and might weaken the impression we seek to make.”³¹ Subsequently, Marshall, claiming both that the arrangement had been agreed to by the railroad and that he had won the railroad what it wanted from the Virginia legislature, sued the railroad over its failure to pay his fee.

The dispute ultimately came before the United States Supreme Court, which dismissed Marshall’s claim, finding the contract void for public policy. Although the Court determined that “[a]ll persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees,”³² Marshall’s concealment of his role as the railroad’s agent was troubling: “A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature.”³³ And the Court expressed concern that the contingency arrangement would inevitably lead to improper influence and outright corruption:

“Bribes in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are proper means; and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or careless’ members in favor of his bill. The use of such means and agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector.”³⁴

The Court concluded that “contracts for a contingent compensation for obtaining legislation, or to use any personal or any secret influence or any secret or sinister influence on legislators, is

³¹ Id.

³² Id. at 334-35.

³³ Id. at 335.

³⁴ Id.

void by policy of the law.”³⁵

Marshall foreshadowed some of the principal themes of lobbying regulation today: recognition of the right to present “claims and arguments” to the legislature and to hire representatives to assist in doing so; hostility to secrecy and a preference for the transparency of lobbying arrangements; and anxiety that lobbyists will employ improper means or exercise undue influence in pursuit of their goals. *Marshall* focused on the potential for improper influence inherent in secrecy and the use of contingency fees, but in other cases the Court treated lobbying *per se* as troublesome. A decade after *Marshall*, the Supreme Court decided *Providence Tool Company v. Norris*,³⁶ which involved a contingent fee agreement pursuant to which a lobbyist had secured Providence Tool a contract to provide muskets to the Union Army at the outset of the Civil War. Justice Field declared that “all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution.”³⁷ Inherent in lobbying is the “tendency . . . to introduce personal solicitation and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds.”³⁸ Lobbying contracts were invalid “whether [or not] improper influences were contemplated or used, but upon the corrupting tendency of the agreements,” and contingency agreements were particularly problematic because of the incentive to “the use of sinister and corrupt means for the

³⁵ Id. at 336.

³⁶ 59 U.S. 45 (1864).

³⁷ Id. at 56.

³⁸ Id. at 54-56.

accomplishment of the end desired.”³⁹

In *Trist v. Child*,⁴⁰ decided a decade after *Provident Tool*, the Court clarified that some contracts for “purely professional services” in presenting legislation to Congress would be valid and enforceable.

“[D]rafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority. But such services are separated by a broad line of demarcation from personal solicitation.”⁴¹

The Court provided as an example of objectionable activity a letter from the lobbyist to his client urging him:

“Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know to work. Even if he knows a page, for a page often gets a vote.”

The Court strongly condemned such paid personal-solicitation lobbying:

“The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy.”⁴²

To be sure, the contingent compensation aggravated the abuse. “[W]here the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.”⁴³ But the reliance on “personal solicitation” to influence legislative action was itself a problem.

³⁹ Id. at 54-55.

⁴⁰ 88 U.S. 441 (1874).

⁴¹ Id. at 450.

⁴² Id. at 451.

⁴³ Id. at 452.

At the start of the twentieth century, the Court remained hostile to the payment of compensation for lobbying. In *Hazelton v. Sheckels*,⁴⁴ Justice Holmes determined that where part of the consideration for a contract consisted of “services in procuring legislation upon a matter of public interest” the contract could not be enforced.⁴⁵ Similarly, in *Earle v. Myers*⁴⁶ in 1907, the Court noted that “services . . . of the kind known as lobbying services” involving the use of “personal influence and personal solicitation with members of Congress” were “illicit” and claims for compensation for such services were unenforceable.⁴⁷ On the other hand, in the 1927 decision in *Steele v. Drummond*,⁴⁸ the Court found that a contract which required, in part, that the plaintiff seek the enactment of local ordinances approving the construction of a proposed railroad line in a particular location, was valid in the absence of a showing that the contract “require[ed] or contemplate[ed] . . . action as a matter of favor by means of personal influence, solicitation and the like, or by other improper or corrupt means.” Without evidence “that tends to indicate that in the promotion or passage of [the ordinances] there was any departure from the best standards of duty to the public,” the plaintiff’s claim would be enforced.⁴⁹

These Supreme Court decisions are representative of a number of federal and state cases from the nineteenth and twentieth centuries that grappled with lobbying. Most dealt with the propriety of paying for lobbyists’ services, whether under a contingent fee agreement or in suits against corporate boards of directors or public bodies for authorizing the hiring of lobbyists.⁵⁰

⁴⁴ 202 U.S. 71 (1906).

⁴⁵ Id. at 78.

⁴⁶ 207 U.S. 244 (1907).

⁴⁷ Id. at 248.

⁴⁸ 275 U.S. 199 (1927).

⁴⁹ Id. at 206.

⁵⁰ See, e.g., *Shea v. Mabry*, 69 Tenn. 319 (1878) (claim of misuse of corporate funds in hiring a lobbyist); *Crawford v. Imperial Irr. Dist.*, 253 P. 726 (Cal. 1927) (taxpayer suit against district board of directors for hiring a lobbyist).

Some of the early cases were particularly hostile to paid lobbyists. A New York court damned the “swarms of hired retainers of the claimants upon public bounty or justice” as a threat to “free, honorable, and correct” legislative deliberation,⁵¹ and a Tennessee court asserted that “[t]he practice of lobbying is in its very nature demoralizing and corrupting.”⁵² Others recognized that “the use of money to influence legislation is not always wrong. It depends upon the manner of its use.”⁵³ As the Kansas Supreme Court explained in 1871:

“If it be used to pay for the publication of circulars or pamphlets, or otherwise, or the collection or distribution of information openly and publicly among the members of the legislature, there is nothing objectionable or improper. But if it be used directly in bribing, or indirectly in working up a personal influence upon individual members, conciliating them by suppers, presents, or any of the machinery so well known to lobbyists, which aims to secure a member’s vote without reference to his judgment, then it is not only illegal but one of the grossest infractions of social duty of which an individual can, under the circumstances of the present day, be guilty. . . . For it is the way of death to republican institutions.”⁵⁴

Perhaps the most striking feature of these early cases, particularly those that struggled to distinguish between proper and improper means of seeking legislative action is their view that “personal influence,” “importunities to members of the legislature,” “seducing or influencing them by any other arguments, persuasions, or inducements than such as directly and legitimately bear upon the merits of the pending application”⁵⁵ were improper actions akin to bribery and corruption. Personal influence was often linked to lack of transparency, with courts referring to “dishonest, secret, or unfair means;”⁵⁶ “secret and insidious overtures,”⁵⁷ or “the use of

⁵¹ *Harris v. Roof’s Executors*, 10 Barb. 489, 494-95 (Sup Ct. N.Y. Co., N.Y. 1851).

⁵² *Shea v. Mabry*, *supra*, 69 Tenn. at 341-42.

⁵³ *Kansas Pac. Ry. Co. v. McCoy*, 8 Kan. 538, 543 (1871).

⁵⁴ *Id.* at 543-44.

⁵⁵ *Brown v. Brown*, 34 Barb. 533, 537 (Sup Ct., General Term, N.Y. 1861).

⁵⁶ *Foltz v. Cogswell*, 25 P. 60, 62 (Cal. 1890).

⁵⁷ *Houlton v. Dunn*, 61 N.W. 898, 899 (Minn. 1895)

personal, or any secret or sinister, influence upon legislators.”⁵⁸ But even in the absence of a showing of bribery, secrecy, “hang[ing] around legislators for the purpose of influencing such legislators whereby legislative action is to be procured,”⁵⁹ and the personal solicitation of legislative votes were tantamount to corruption. Influence disconnected from substantive information or public-regarding arguments about the merits of a measure – even without bribery or criminal misconduct – tended to corrupt the legislative process. By contrast, more public efforts – testimony in public hearings before legislative committees,⁶⁰ “the collecting of facts, and presenting them to the proper officers, making arguments thereon”⁶¹ -- and the use of “special knowledge and training” derived from “years of study and experience” concerning the issue in dispute -- were legitimate means of seeking legislative action.⁶²

Although lobbying in this period was often treated as a shady, indeed, illicit activity – the California constitution actually made lobbying a felony⁶³ – legal condemnation did not extend to all paid efforts to influence the legislature, but only those involving “bribery, promise of reward, intimidation, or any other dishonest means.”⁶⁴ The difference between this period and our own was the widespread determination that lobbyists’ use of personal influence, including personal solicitation of legislative votes, fell on the corruption side of the corruption/legitimate advocacy divide. The particular problem with the contingency fee agreements that triggered much of this litigation was that they were seen as providing an incentive to the use of improper means of

⁵⁸ Crawford v. Imperial Irr. Dist., supra, 253 P. at 728.

⁵⁹ Burke v. Wood, 162 F. 533, 541 (S.D. Ala. 1908).

⁶⁰ Crawford v. Imperial Irr. Dist, supra, 253 P. at 728-29.

⁶¹ Houlton v. Nichol, 67 N.W. 715, 718 (Wis. 1896).

⁶² Id.

⁶³ See Foltz, supra, 25 P. at 62 (quoting Article 4, section 35 of the California constitution).

⁶⁴ Id.

seeking legislative action, even when the actual use of improper means had not been proven.⁶⁵ But the deeper point was the courts' tendency to conclude that legislative advocacy involving private meetings, personal solicitations, and the use of personal influence – a term never precisely defined, but used as a contrast to influence based on facts, “fair argument and legitimate evidence”⁶⁶ relating to the merits of a legislative proposal – went beyond the scope of legitimate representation.

Although some courts in this period noted the value of appropriate advocacy in obtaining laws that could advance the public interest,⁶⁷ there was little discussion of constitutional law and, in particular, no reference to the First Amendment. These were all common law contracts cases, although often inflected by concerns about the needs of our republican form of government.⁶⁸ After World War II, however, issues involving the regulation of lobbying were constitutionalized as the Supreme Court determined that lobbying involved First Amendment rights. That development is the focus of the next section.

B. Lobbying and the First Amendment

In the 1950s, the Supreme Court reframed its analysis of lobbying from a focus on the potential for improper influence latent in lobbyists' efforts at personal persuasion of legislators to the First Amendment's protection of the communication about political and policy matters which lies at the core of lobbying. The Court's new approach, however, recognized that even though protected by the First Amendment, lobbying may be regulated to protect the integrity of the legislative process.

⁶⁵ See, e.g., Note, Contingent Fee Contract to Procure Legislation, 45 Yale L.J. 731, 733 (1936).

⁶⁶ *Houlton v. Dunn*, 61 N.W. 898, 901 (Minn. 1895).

⁶⁷ See, e.g., *id.* at 900 (noting that “frequently our educational, charitable, and humane laws are thus procured”).

⁶⁸ See, e.g., *id.* at 901 (noting that the “present iniquitous system of lobbying with members of our legislative bodies and public officials is fast becoming a menace to our capacity for self-government”).

In *United States v. Rumely*,⁶⁹ the Court considered the scope of the investigative authority of the House of Representatives' Select Committee on Lobbying Activities, which had been created by the House in 1949 to examine how well the Federal Regulation of Lobbying Act of 1946 ("FRLA") was working. The Committee was authorized *inter alia* to "conduct a study and investigation of . . . all lobbying activities intended to influence, encourage, promote or retard legislation." As part of its investigation it sought to obtain from Rumely, the secretary of an organization known as the Committee for Constitutional Government, records concerning the organization's sale "of books of a particular political tendentiousness," particularly the names of those who had made bulk purchases of those books for subsequent distribution. When Rumely refused to provide the information, the House sought to hold him in contempt.

Writing for the Court, Justice Frankfurter expressed the concern that permitting the Committee to inquire into "all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."⁷⁰ But the Court stopped short of holding the investigation unconstitutional. Instead, Justice Frankfurter noted that Congress had not defined "lobbying activities" in the resolution authorizing the investigation. He concluded that in order to "avoid a serious constitutional doubt" about whether Congress could investigate the sale of political books to the public the phrase "lobbying activities" would be read to mean "lobbying in its commonly accepted sense, that is representations made directly to Congress, its members, or its

⁶⁹ 345 U.S. 41 (1953).

⁷⁰ *Id.* at 46.

committees.”⁷¹ Using this narrower definition of lobbying, Justice Frankfurter determined that Congress had not granted the Committee the authority to investigate Rumely’s organization’s activities.⁷²

The Court returned to the meaning of “lobbying activities,” the scope of Congressional authority to regulate lobbying, and the role of the First Amendment the following year in *United States v. Harriss*,⁷³ which involved a prosecution brought against the National Farm Committee and several individuals for violations of the reporting requirements of the FRLA. Specifically, the Committee was charged with failing to report the solicitation and receipt of contributions to influence the passage of legislation, and the individuals were charged with failing to report expenditures for the same purpose. The expenditures included “payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings concerning legislation” and payments “related to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation.” The defendants contended the statute violated the First Amendment and that its “vague and indefinite” language violated the Due Process Clause. The Court rejected both arguments.

Relying on *Rumely*, the Court interpreted the FRLA to apply only to “‘lobbying in its commonly accepted sense’ -- to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or

⁷¹ Id. at 47.

⁷² Id. at 44-49. Justices Black and Douglas concurred in the result but would have held that the investigative resolution was unconstitutional.

⁷³ 347 U.S. 612 (1954).

through their hirelings or through an artificially stimulated letter campaign.”⁷⁴ As such it satisfied the due process requirement of definiteness without violating the freedoms guaranteed by the First Amendment - freedom to speak, publish, and petition the Government. Chief Justice Warren explained that the measure was justified by Congress’s legitimate interest in knowing who is behind efforts to influence legislative action:

“Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . . Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. . . . Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. And here Congress has used that power in a manner restricted to its appropriate end.”⁷⁵

Harris is significant in three respects. First, without expressly saying so, the Court clearly indicated that lobbying is protected by the First Amendment. Although the Court acknowledged that lobbying involves placing pressures on members of Congress -- which greatly troubled the Court in the older contingency fee cases -- *Harris* emphasized in upholding the

⁷⁴ Id. at 620.

⁷⁵ Id. at 625-26. Justice Douglas, joined by Justice Black, and Justice Jackson in a separate opinion dissented. The dissenters found the statute to be vague and overbroad and thus a burden on First Amendment rights. Justice Douglas left open the possibility that with a properly-drawn statute Congress might have “power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups.” Id. at 632. Similarly, Justice Jackson noted that he did not disagree with the Court’s assumption that “Congress has power to regulate lobbying for hire as a business or profession and to require such agents to disclose their principals, their activities, and their receipts.” Id. at 636.

FRLA that “Congress has not sought to prohibit these pressures.”⁷⁶ The limited scope of Congress’s regulation was critical to the statute’s constitutionality.

In later cases, the Court confirmed the First Amendment’s protection of lobbying. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,⁷⁷ for example, the Court held that the contention that a group of businesses conspired to seek passage of legislation beneficial to them and harmful to their competitors did not state a claim of an antitrust violation: “[S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”⁷⁸

Second, the Court upheld disclosure because of Congress’s interest in understanding who is behind efforts to influence it. This carried forward *Marshall*’s view more than a century earlier that a lobbyist’s failure to disclose the principal on whose behalf he acts is a form of deceit. Strikingly, given our current sense that the purpose of disclosure is to educate the public, inform the voters, and, thus, ultimately, advance the goal of government accountability to the people, *Harriss*, like *Marshall*, stressed the importance of lobbying disclosure to those who are lobbied – in this case, members of Congress – to enable them to better understand the forces behind the lobbyists seeking to influence them. The Court also analogized lobbyist disclosure to the Federal Corrupt Practices Act, an early federal campaign finance law, which had imposed contribution and expenditure reporting requirements on elected officials. In adopting the FRLA, Congress “acted in the same spirit and for a similar purpose as it did in passing the Federal Corrupt

⁷⁶ Id. at 625.

⁷⁷ 365 U.S. 127 (1961).

⁷⁸ Id. at 138.

Practices Act -- to maintain the integrity of a basic governmental process.⁷⁹ The Court's support for disclosure of the identities of those behind lobbying activities was confirmed more recently in *Citizens United v. Federal Election Commission*,⁸⁰ in which the Court cited and quoted from *Harriss* in rejecting Citizens United's challenge to federal campaign finance disclosure requirements, even as it sustained the organization's attack on campaign spending limitations:

“And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed 989 (1954) (Congress has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose).”⁸¹

Third, the Court sent mixed signals about the constitutionality of applying disclosure requirements to money spent on efforts to persuade the public to communicate with legislators as part of efforts to pass or block legislation -- what has come to be referred to as “grassroots lobbying.” On the one hand, one of the charges against the *Harriss* defendants involved their failure to report grassroots expenditures. In its reference to the legislative history of the FRLA, the Court grouped grassroots activity with direct communications to members of the Congress when it explained that “at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings *or through an artificially stimulated letter writing campaign*.”⁸² And in a footnote the Court quoted at length from the Senate and House reports accompanying the title of the bill that became the FRLA, which laid out the three distinct classes of so-called lobbyists who would be subject to disclosure requirements. The first group mentioned was

⁷⁹ 347 U.S. at 625.

⁸⁰ 558 U.S. 310, 130 S.Ct. 876 (2010).

⁸¹ 130 S.Ct. at 915.

⁸² *Harriss*, *supra*, 347 U.S. at 620 (emphasis supplied).

“[t]hose who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.”⁸³

On the other hand, the Court construed the Act to refer only to “‘lobbying in its commonly accepted sense’ -- to direct communications with members of Congress on pending or proposed federal legislation.”⁸⁴ That would appear to exclude communications from interest groups to the public to stimulate public communications to Congress. In so reading the Act, the Court quoted from and invoked *Rumely*, with its suggestion that such a narrower reading was necessary to avoid a constitutional question.

The Court has not directly addressed the constitutionality of the regulation of lobbying per se since *Harriss*. However, other cases have carried forward *Harriss*’s main themes that lobbying falls within the First Amendment’s protection of speech, press, and petition, but that some regulation of lobbying is constitutional and, indeed, appropriate to maintain the integrity of the governmental process. Lower courts have relied on *Harriss* in striking down state laws that impose excessive registration fees on lobbyists and, thus, are tantamount to a tax on political communication, but have also cited *Harriss* in upholding federal and state laws requiring lobbyists to register and file periodic reports concerning their finances and activities.

Five years after *Harriss*, in *Cammarano v. United States*,⁸⁵ the Court considered and rejected the claim that a Treasury regulation denying a deduction for “ordinary and necessary” business expenses for money spent for lobbying purposes violated the First Amendment. The

⁸³ Id. at 621, n.10.

⁸⁴ Id. at 620.

⁸⁵ 358 U.S. 498 (1959).

Court denied that the regulation discriminated against or burdened speech: “Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in such activities is required to do.”⁸⁶ Moreover, the regulation was justified by the legitimate Congressional goal of promoting a level playing field for lobbying activity: “[I]t appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.”⁸⁷

Twenty-five years after *Cammarano*, in *Regan v. Taxation with Representation of Washington*,⁸⁸ the Court also upheld against a First Amendment challenge the provision of the Internal Revenue Code conditioning the availability of a tax deduction for contributions to 501(c)(3) charities on the requirement that “no substantial part of the activities” of the charity “is carrying on propaganda or otherwise attempting to influence legislation.” As in *Cammarano*, the Court concluded this restriction did “not infringe[] any First Amendment rights or regulate any First Amendment activity.” Rather, it simply reflected Congress’s decision “not to pay for” lobbying.⁸⁹

In an important concurring opinion, Justice Blackmun, joined by Justices Brennan and Marshall, wrote that although the First Amendment does not require a tax subsidy for lobbying,

⁸⁶ Id. at 513.

⁸⁷ Id.

⁸⁸ 461 U.S. 540 (1983).

⁸⁹ Id. at 546. The Supreme Court recently reaffirmed *Regan*’s central holding that the denial of a tax deduction for lobbying expenses is a permissible Congressional decision not to provide a subsidy for efforts attempting to influence legislation and is not an unconstitutional burden on protected First Amendment activity. *See Agency for Int’l Devel. v. Alliance for Open Society Int’l*, 133 S.Ct. 2321, 2328-29 (2013).

conditioning the tax subsidy on a complete prohibition of lobbying by the benefitted organization would be unconstitutional as it would “den[y] a significant benefit to organizations choosing to exercise their constitutional rights.” However, because the tax code permits a 501(c)(3) charity to establish a 501(c)(4) affiliate -- a (c)(4) is exempt from tax on its income, but contributions to the (c)(4) are not tax-deductible to the donors -- which could engage in lobbying, the limitation on lobbying by the 501(c)(3) is constitutional. In the view of the concurring justices, the tax code could prevent an organization from using tax-deductible contributions for lobbying but could limit the use for lobbying of *only* the tax-deductible contributions, not other funds. For them, the First Amendment barred conditioning the tax benefit on a prohibition of all lobbying, including lobbying financed from unsubsidized donations.⁹⁰

The tax cases, thus, confirm *Rumely* and *Harriss* in finding that although laws affecting lobbying will be viewed through the prism of the First Amendment, regulatory measures may be sustained where they promote traditional goals like transparency and the prevention of unfairness and do not unduly burden the core lobbying activity of legislative advocacy.⁹¹

III. Lobbying and Campaign Participation

A. Background

A central focus of efforts to restrict the exercise of improper influence by lobbyists has been to limit the ability of lobbyists to provide government officials with gifts or comparable material benefits such as honoraria for speeches or complementary travel, meals, or

⁹⁰ Id. at 551-54.

⁹¹ Cf. *Autor v. Pritzker*, ___ F.3d ___ (D.C. Cir. Jan. 17, 2014) (holding that lawsuit by lobbyists challenging presidential executive order making registered lobbyists ineligible to serve on federal Industry Trade Advisory Committees states a “viable First Amendment unconstitutional conditions claim” because the “ban pressures them to limit their constitutional right to petition”).

entertainment. The scope of these restrictions varies considerably and states and local governments continue to revise and extend these rules.⁹² But elected officials may be at least as grateful for donations to or other forms of active support for their election campaigns as for tickets to the Super Bowl or golfing trips. As Professor Luneburg has observed, “lobbyist assistance in political fundraising is a matter of intense interest today.”⁹³ Thomas Susman has pointed out that lobbyists are actively involved in electoral campaigns through “writing checks, hosting or attending fundraisers, delivering bundled checks, or acting as treasurer of a reelection committee.” As a result, “lobbyists [are] a principal source of fundraising for candidates.”⁹⁴ This carries the potential (some would say danger) of triggering reciprocal favors by the officeholder. Although Dean Nicholas Allard has suggested that the role of campaign contributions in lobbying has been overstated, he also agrees that it would be “unrealistic to dismiss the role of campaign contributions on the lobbying process.” Moreover, he notes that as laws and regulations restrict or prohibit lobbyists from giving gifts to legislators or paying for their meals or entertainment, the salience of campaign contributions and other forms of campaign participation as a means for lobbyists to influence officials has grown:

⁹² See, e.g., Walter Moskop, St. Louis Post-Dispatch, “Missouri politicians took more than \$750K in lobbyist gifts during session,” July 2, 2013, http://www.stltoday.com/news/local/govt-and-politics/political-fix/missouri-politicians-took-more-than-k-in-lobbyist-gifts-during/html_d0e4e4e0-68cb-5a0f-8d86-6847e0aa902c.html; Chris Joyner, “Loopholes abound in some lobbyist gift bans,” Atlanta Journal-Constitution, Oct. 14, 2012, <http://www.ajc.com/news/news/loopholes-abound-in-some-lobbyist-gift-bans/nScjt/>; Andy Johns, Times Free Press, “Georgia lawmakers defend lobbyist dollars,” July 5, 2011, <http://www.timesfreepress.com/news/2011/jul/05/georgia-lawmakers-defend-lobbyist-dollars/>; Phillip Rawls, “Gambling trial highlights fees paid to legislators,” June 26, 2011, <http://www.vcstar.com/news/2011/jun/26/gambling-trial-highlights-fees-paid-to/>. A particularly interesting question arises when an elected official donates to an official’s favorite charity (such as an academic center named in honor of the official or a foundation run by a member of the official’s family). See, e.g., Eric Lipton, Wife’s Charity Offers Corporate Tie to a Governor, N.Y. Times, March 2, 2011. <http://www.nytimes.com/2011/03/03/us/politics/03jindal.html?pagewanted=all>.

⁹³ William V. Luneburg, “The Evolution of Federal Lobbying Regulation,” 41 McGeorge L. Rev. 85, 114 (2009).

⁹⁴ Thomas Susman, Lobbying in the 21st Century Reciprocity and the Need for Reform, 58 Admin L. Rev. 737, 744-45 (2006).

“By prohibiting and restricting a wide array of activities and contacts involving lobbyists that are, in most cases, still permitted if related to fundraising activities, the new rules enhance the already too important impact of fundraising on the political process, thus increasing the risk of the perception, if not the reality, of impropriety. For example, under the [new federal] rules, a lobbyist may not buy a Congressman a meal at a restaurant unless he and perhaps other guests also hand over checks as campaign contributions.”⁹⁵

Indeed, as the New York Times recently found, the campaign finance “loophole allows lawmakers to reel in trips and donations” through “destination fund-raisers, where business interests blend with pleasure in exclusive vacation venues.”⁹⁶ Public interest organizations have also given extensive attention to the campaign finance practices of lobbyists as donors, bundlers, and fundraisers. The 2011 report of the ABA’s Task Force on Federal Lobbying Laws made several recommendations for the “separation of lobbying and campaign participation.”⁹⁷

The Honest Leadership and Open Government Act of 2007 (HLOGA)⁹⁸ -- the most recent major revision of federal lobbying law -- addressed the campaign finance practices of lobbyists. HLOGA requires federal candidate campaign committees, political party committees, and leadership PACs to disclose the bundled contributions received from federally registered lobbyists that are in excess of \$15,000 in a six-month period.⁹⁹ Bundled contribution are those that have been collected by an individual and forwarded -- “in a bundle” -- to a political

⁹⁵ Nicholas W. Allard, *Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 Stan. L. & Pol. Rev. 23, 60 (2008).

⁹⁶ Eric Lipton, “A Loophole Allows Lawmakers to Reel in Trips and Donations,” N.Y. Times, Jan. 19, 2014, <http://www.nytimes.com/2014/01/20/us/politics/a-loophole-allows-lawmakers-to-reel-in-trips-and-donations.html?ref=todayspaper>.

⁹⁷ “Lobbying Law in the Spotlight: Challenges and Improvements,” Report of the Task Force on Federal Lobbying Laws, Section of Administrative Law and Regulatory Practice, American Bar Ass’n, (hereinafter “ABA Task Force Report”), Jan 3, 2011, at 19.

⁹⁸ P.L. 110-81, 121 Stat. 735 (110th Cong., 1st Sess.).

⁹⁹ 2 U.S.C. § 434 (i).

committee of campaign in such a way that the person collecting and forwarding the funds is credited by the recipient with raising the money.¹⁰⁰

Many states go much further than disclosure and impose substantive limitations on lobbyists' campaign finance activities. Nearly a dozen states prohibit lobbyists from making - and legislators, state elected officials, and candidates for state office from accepting - campaign contributions while the legislature is in session.¹⁰¹ Another five states flatly ban contributions by lobbyists to some categories of elected officials or candidates for elective office, such as those holding or seeking offices the lobbyist has registered to lobby.¹⁰² Some impose a lower donation limit on lobbyists' contributions to candidates or political committees than would apply to other donors.¹⁰³ North Carolina not only bans lobbyists from contributing to legislators and other public officials but also bars lobbyists from engaging in bundling;¹⁰⁴ Maryland prohibits regulated lobbyists from fundraising for candidates, including soliciting or transmitting contributions, sitting on a fundraising committee, or serving as a campaign treasurer.¹⁰⁵ Other state laws have been more modest, requiring only that lobbyists disclose their campaign

¹⁰⁰ 2 U.S.C. § 434(i)(8)(A).

¹⁰¹ According to the National Conference of State Legislatures, eleven states ban lobbyist contributions while the legislature is in session. See NCSL, Limits on Campaign Contributions During the Legislative Session (Dec. 6, 2011), <http://www.ncsl.org/legislatures-elections/elections/limits-on-contributions-during-session.aspx>. See also Kevin O'Hanlon, Lincoln Journal Star, "Senators want to stop lobbyist contributions during session," Feb. 19, 2013, http://journalstar.com/legislature/senators-want-to-stop-lobbyist-contributions-during-session/article_65813aa2-6708-57e7-b1da-15488a66b4b7.html.

¹⁰² NCSL, "Prohibited Donors," Dec. 6, 2011 (five states – Alaska, California, Kentucky, South Carolina, and Tennessee -- prohibit lobbyists from making campaign contributions to candidates for some elected offices), <http://www.ncsl.org/legislatures-elections/elections/prohibited-donors.aspx>

¹⁰³ Id. (Massachusetts). See also N.Y.C. Admin Code § 3-703 (imposing substantially lower contribution limits on donations to candidates for New York City office by lobbyists and other individuals and entities that have business dealings with the City).

¹⁰⁴ N.C. Stat. § 163-278.13C.

¹⁰⁵ Md. Code, State Gov't, § 15-714.

contributions or their bundled contributions in their lobbying reports.¹⁰⁶ Unsurprisingly, many of these restrictions have drawn constitutional challenges.

B. The Evolving Case Law

The most common state provision aimed at lobbyists' campaign finance participation, and the one most frequently challenged is the ban on lobbyist contributions while the legislature is in session. These have drawn a mixed judicial reaction, with such bans struck down by state or federal district courts in Alaska,¹⁰⁷ Arkansas,¹⁰⁸ Florida,¹⁰⁹ and Missouri.¹¹⁰ In addition, a federal district court in Tennessee invalidated the application of that state's ban on lobbyist contributions during the legislative session to non-incumbent candidates for office, albeit without addressing whether the ban could constitutionally be applied to incumbents.¹¹¹ On the other hand, two courts -- the Vermont Supreme Court¹¹² and the United States Court of Appeals for the Fourth Circuit¹¹³ -- upheld session contribution bans.

The courts invalidating the bans found them to be overinclusive in barring even small contributions; in applying to contributions to elected statewide officials who were not part of the legislative process; or in applying to contributions to nonincumbents.¹¹⁴ Some bans have also been found to be underinclusive because they target contributions only during the legislative session or shortly thereafter, thus failing "to recognize that corruption can occur anytime, even

¹⁰⁶ See, e.g., Conn. Gen. Stat. 9-610(g); R.I. Gen. Laws § 22-10-9; Wash. Rev. Code § 42.17.170.

¹⁰⁷ *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 630-31 (Alaska. 1999).

¹⁰⁸ *Ark. Right to Life State PAC v. Butler*, 29 F.Supp.2d 540, 55-53 (W.D. Ark. 1998).

¹⁰⁹ *State v. Dodd*, 561 So.2d 263 (Fla. 1990).

¹¹⁰ *Shrink Missouri Gov't PAC v. Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996).

¹¹¹ *Emison v. Catalano*, 951 F. Supp. 714 (E.D. Tenn. 1996).

¹¹² *Kimbell v. Hooper*, 655 A.2d 44 (Vt. 1995).

¹¹³ *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), cert. den. 528 U.S. 1153 (2000).

¹¹⁴ See, e.g., *Butler*, 29 F.supp.2d at 552; *Dodd*, 561 So.2d at 265; *Alaska CLU*, 978 P.2d at 631.

outside the banned time period.”¹¹⁵ By taking a potentially large chunk of the year out of the fundraising process, the bans were said to help incumbents, as challengers would have less time to overcome the built-in advantages incumbents enjoy.¹¹⁶ Moreover, given the possibility of “unusually long” or extra legislative sessions, a session fundraising ban can be a significant burden on fundraising activity.¹¹⁷

The Fourth Circuit in *North Carolina Right to Life, Inc. v. Bartlett* undertook the most substantial treatment of the constitutional question posed by a session contribution ban. Chief Judge Wilkinson applied strict judicial scrutiny to the contribution restriction but still found it justified by the compelling state interest in preventing corruption and the appearance of corruption:

“With respect to actual corruption, lobbyists are paid to effectuate particular political outcomes. The pressure on them mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange ‘dollars for political favors’ can be powerful. . . . While lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line. State governments need not await the onset of scandal before taking action.

The appearance of corruption resulting from . . . lobbyist contributions during the legislative session can also be corrosive. Even if lobbyists have no intention of directly ‘purchasing’ favorable treatment, appearances may be otherwise. The First Amendment does not prevent states such as North Carolina from recognizing these dangers and taking reasonable steps to ensure that the appearance of corruption does not undermine public confidence in the integrity of representative democracy.”¹¹⁸

Chief Judge Wilkinson also found the restriction to be narrowly tailored, as the legislative session typically, although not invariably, runs just a few months in an election year and is also

¹¹⁵ See, e.g., Maupin, 922 F.Supp. at 1422; Butler, 29 F.Supp.2d at 552; Dodd, 561 So.2d at 265-66.

¹¹⁶ Emison, 951 F.Supp. at 723; Dodd, 561 So.2d at 565-66.

¹¹⁷ Dodd, 561 So.2d at 564.

¹¹⁸ 168 F.3d at 715-16.

the period “during which the risk of an actual quid pro quo or the appearance of one runs highest.”¹¹⁹

Broader bans on lobbyists’ campaign contributions have also drawn constitutional challenges, with similarly mixed results.¹²⁰ In 1979, the California Supreme Court struck down a complete prohibition on lobbyists’ campaign contributions, adopted by voter initiative in 1974. The court found the ban to be fatally overbroad because it applied to donations “to any and all candidates even though the lobbyist may never have occasion to lobby the candidate.” The court also noted that by applying to small as well as large contributions the ban was not “narrowly directed to the aspects of political association where potential corruption might be identified.”¹²¹ Two decades later a federal district court upheld a more tightly focused ban, adopted by California voters in 2001, which prohibits lobbyists from making contributions only to those candidates running for the offices the lobbyist has registered to lobby.¹²² The Alaska Supreme Court sustained a somewhat broader ban on contributions by lobbyists to candidates in legislative districts outside the district in which the lobbyist is eligible to vote.¹²³

Both the Alaska and more recent California court decisions emphasized the dangers posed by lobbyists’ contributions while minimizing the burden the restrictions placed on lobbyists’ constitutional rights. The Alaska court found that lobbyist contributions “create special

¹¹⁹ Id. at 716.

¹²⁰ See generally *Fair Political Practices Comm. v. Superior Court*, 599 F.2d 46 (Cal. 1979); *Institute of Government Advocates v. Fair Political Practices Comm.*, 164 F. Supp.2d 1183 (E.D. Cal. 2001); *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999); *Associated Indus. of Kentucky v. Comm.*, 912 S.W.2d 947 (Ky. 1995); *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2nd Cir. 2010); *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011).

¹²¹ *Fair Political Practices Comm. v. Super. Ct.*, 599 P.2d at 52, 53.

¹²² *Institute of Government Advocates*, 164 F. Supp.2d at 1190.

¹²³ *Alaska CLU*, 978 P.2d at 617-20.

risks of actual or apparent corruption because of the lobbyist's special role in the legislative system."¹²⁴ The lobbyist's incentive to make contributions to large numbers of legislators who are "in position to introduce or thwart legislation and to vote in committees or on the floor on matters of professional interest to the lobbyist . . . creates a very real perception of interest-buying."¹²⁵ In language echoing the nineteenth and early twentieth century contingent fee cases, the California court emphasized that lobbyists' contributions present a special danger of corruption because their "continued employment depends on their success in influencing legislative action."¹²⁶ These courts found that the restrictions were narrowly tailored to focus on the danger of undue influence without burdening lobbyists' rights because they did not limit the ability of lobbyists to undertake independent expenditures, contribute to political parties, or volunteer on behalf of legislative campaigns.¹²⁷

In 2010 and 2011, two federal appeals courts divided over the constitutionality of state laws banning campaign contributions by lobbyists. In *Green Party of Connecticut v. Garfield*,¹²⁸ the United States Court of Appeals for the Second Circuit invalidated a Connecticut law prohibiting lobbyists and their family members from contributing to any statewide or state legislative candidate, a legislative caucus or leadership committee, or a party committee, and from soliciting contributions for such candidates or committees. The court emphasized that a complete ban, as opposed to a tight limit on, campaign contributions imposed a serious burden on First Amendment rights. Writing for the court, Judge Cabranes acknowledged the contention

¹²⁴ Id. at 619.

¹²⁵ Id.

¹²⁶ Institute of Government Advocates, 164 F.Supp.2d at 1193-94.

¹²⁷ Id. at 1192-93; Alaska CLU, 978 P.2d at 619.

¹²⁸ 616 F.3d 189 (2d Cir. 2010).

that lobbyists receive special attention from elected officials, but denied there was anything improper about that:

“Influence and access, moreover, are not sinister in nature. Some influence, such as wise counsel from a trusted advisor - even a lobbyist - can enhance the effectiveness of our representative government.”¹²⁹

Earlier in the same opinion, the court had upheld Connecticut’s flat prohibition on campaign contributions by government contractors, finding the contractor ban justified because recent Connecticut scandals involving corrupt dealings between contractors and government officials created an appearance of corruption with respect to all exchanges of money between state contractors and candidates for state office.¹³⁰ But “the recent corruption scandals had nothing to do with lobbyists”¹³¹ so a comparable blanket ban on contributions by lobbyists could not be justified. The court also found that the solicitation ban was not narrowly tailored to preventing the kind of improper influence that might result from the bundling of contributions; however, the court suggested that “a less restrictive alternative” focused on large-scale bundling might pass constitutional muster.¹³² The following year, a different Second Circuit panel in *Ognibene v. Parkes*¹³³ upheld a New York City law sharply lowering the permissible limits on contributions by lobbyists and persons and firms doing business with the City to candidates for municipal office. *Ognibene* relied on *Green Party*’s differentiation between a ban and a limit to distinguish the earlier case.

¹²⁹ Id. at 207.

¹³⁰ Id. at 199-205.

¹³¹ Id. at 206.

¹³² Id.

¹³³ 671 F.3d 174 (2d Cir. 2011), cert. den., 133 S.Ct. 28 (2012).

In contrast to the Second Circuit’s *Green Party* decision, the Fourth Circuit in *Preston v. Leake*¹³⁴ in 2011 upheld North Carolina’s total ban on lobbyist contributions against both a facial attack and an “as-applied” claim by the plaintiff lobbyist that her stated desire to make only \$25 contributions to her favorite candidates did not raise any danger of corruption. Writing for the court, Judge Niemeyer reached the conclusion, directly opposed to that of Judge Cabranes and the Second Circuit panel, that “experience has taught” that “lobbyists are especially susceptible to political corruption.”

“The role of a lobbyist is both legitimate and important to legislation and government decision-making, but by its very nature, it is prone to corruption and therefore especially susceptible to public suspicion of corruption. *Any payment* made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into the question the propriety of the relationship, and therefore North Carolina could rationally adjudge that it should ban *all* payments.”¹³⁵

Preston emphasized the limited scope of the ban, which applied only to lobbyists’ contributions to candidates, and did not preclude lobbyists from canvassing for or donating time to a candidate.¹³⁶ Moreover, unlike the situation in Connecticut, lobbyists had been part of the political corruption scandals which had led North Carolina to enact the campaign contributions prohibition in 2006¹³⁷ so the “legislature thus made the rational judgment that a complete ban was necessary as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns.”¹³⁸

Courts have also addressed a handful of other restrictions on the campaign finance practices of lobbyists. A federal district court in Wisconsin held that the portion of the state law

¹³⁴ *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011).

¹³⁵ *Id.* at 737 (emphasis in original).

¹³⁶ *Id.* at 740.

¹³⁷ *Id.* at 729-30.

¹³⁸ *Id.* at 736.

prohibiting lobbyists from furnishing to any agency official, legislative employee of the state, or any candidate for state elective office “any . . . thing of pecuniary value” was unconstitutional to the extent that, as interpreted by the state ethics board, the regulation prohibited lobbyists from volunteering personal services to political campaigns. The court recognized that Wisconsin’s lobby law reflects the legislature’s judgment that, as a class, lobbyists have greater potential to corrupt the political process than do ordinary citizens but the court found that the ethics board had failed to show any basis “for finding that volunteering by lobbyists threatens the integrity of the political process any more than volunteering by other citizens, such as environmental activists, insurance executives, or lawyers, whose volunteering is altogether unregulated.”¹³⁹ On the other hand, a federal district court in Maryland upheld the provisions of that state’s law prohibiting a lobbyist from serving as a campaign treasurer for a candidate or elected official, serving on a candidate’s fundraising committee, or organizing or establishing a political committee for the purpose of soliciting or transmitting contributions. The court sustained these provisions with little discussion, noting simply that those relationships posed a danger of corruption and that the Maryland legislature had acted after “an actual influence peddling scandal” involving a lobbyist.¹⁴⁰

C. Regulating the Campaign Finance-Lobbying Relationship

The increased interpenetration of lobbying law and campaign finance regulation is hardly surprising. Like the gifts, honoraria, and entertainment that lobbyists have long sought to provide to public officials, campaign financial support provides valuable private benefits that build social

¹³⁹ *Barker v. State of Wisconsin Ethics Board*, 841 F. Supp. 255 (W.D. Wis. 1993).

¹⁴⁰ *Maryland Right to Life State Political Action Comm. v. Weathersbee*, 975 F. Supp. 791 (D. Md. 1997).

relationships, cements good will, and may create a predisposition on the part of the elected beneficiaries to reciprocate by giving special access, or even taking official actions helpful, to their lobbyist benefactors.¹⁴¹ Given the premium elected officials place on staying in office or reaching for higher office, campaign finance support may be an even more successful means for lobbyists to ingratiate themselves with officeholders than free meals and entertainment.

But restrictions on lobbyists' campaign finance activities raise constitutional questions not posed by prohibitions on tickets to the Super Bowl or plane tickets for golfing in Scotland. Gifts and free meals are not forms of political speech and association, they do not help finance political speech, and they play no positive role in the electoral system. They are tools for influence peddling and nothing more. By contrast, campaign contributions, the solicitation of donations, and other forms of campaign participation are constitutionally protected. In the absence of full public funding for candidates and political parties, private campaign contributions are essential to the functioning of our electoral system. Candidates, political parties, and other political groups are dependent on donations to pay for their ability to bring facts, arguments, and policy ideas to the voters. Campaign contributions are also a form of political expression and association by donors. To be sure, campaign contributions can be limited in amount, and donations from certain sources may be restricted. But the constitutional protection accorded giving and soliciting campaign funds means that special restrictions on lobbyists' campaign contributions present questions not raised by comparable restrictions on gifts, honoraria, and free meals and entertainment.

¹⁴¹ See, e.g., Lipton, *Loophole Allows Lawmakers to Reel in Trips*, *supra* (“‘An informal setting is an effective way to build a better relationship,’ said a health care lobbyist who attended the fund-raising weekend in Vail this month.”).

The least intrusive form of lobbying regulation, and the one most likely to pass constitutional muster, is disclosure. The Supreme Court has upheld disclosure requirements in both the campaign finance¹⁴² and lobbying contexts. With lobbyists already subject to registration and reporting requirements, it would not be a much greater burden to also require them to detail their campaign finance activities -- contributions over a dollar threshold, bundling over a dollar threshold, fundraising, or service as a campaign treasurer or fundraiser -- in their periodic reports. Although some of this might overlap with reports filed by candidates concerning contributions or staff, it would still be useful for public transparency and voter information to combine lobbying and campaign contribution information in a single place in a form which is filed electronically, downloadable, and searchable.

Going beyond disclosure and specially restricting lobbyists' campaign contributions, whether by subjecting them to tighter limits than those that apply to other donors or barring them from making contributions altogether, presents a more difficult question: Are lobbyists' contributions particularly likely to be sources of the corruption and the appearance of corruption that the Supreme Court has determined is the only constitutionally permissible basis for limiting campaign finance activity? Some courts have been willing to defer to legislative judgments that contributions from lobbyists pose a special risk of improperly influencing government because of lobbyists' regular and extended engagement with the legislative process, their ongoing close contacts with government officials, their inside knowledge, and the financial rewards they obtain from their relationships with officials and other government decision-makers. Other courts, however, have indicated that they do not see lobbyists as necessarily posing any greater dangers than anyone else making campaign contributions, so that tighter restrictions would require more

¹⁴² Citizens United, 130 S.Ct. at 915-16.

specific evidence of lobbyists' involvement in corrupt activities. The disagreement between the Second and Fourth Circuits on this question brings to mind the older judicial debate over whether lobbying is inherently corrupting or whether there has to be some specific showing of misconduct before a lobbying contingency fee could be declared unenforceable.

This issue is intertwined with the question of what ought to be considered improper or undue influence. In *McConnell v FEC*, the Supreme Court upheld restrictions on soft money contributions to the political parties because Congress had demonstrated that such contributions were given in order to win their donors preferential access, which it treated as a species of corruption. In language suggestive of the nineteenth and early twentieth century courts' concern about the threat to self-government posed by "personal influence" and private solicitations, *McConnell* observed:

"Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence. . . . Many of the deeply disturbing examples of such corruption cited by this Court in *Buckley* . . . to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. . . . Even if that access did not secure actual influence, it certainly gave the appearance of such influence."¹⁴³

By contrast, *Citizens United* was sharply critical of the use of "generic favoritism or influence theory" to determine what constitutes improper influence. The Court narrowed the definition of what constitutes corruption, declaring "ingratiation and access, in any event, are not corruption" and urging that the "influence over and access to elected officials" that may follow from the use of campaign money does not mean those officials have been corrupted.¹⁴⁴ To be sure, *Citizens*

¹⁴³ 540 U.S. 93, 150 (2003).

¹⁴⁴ 130 S.Ct. at 910.

United involved spending limits, not contributions, but the decision compounds the uncertainty as to just what must be shown about the impact of lobbyist contributions or fundraising to justify their special restriction.

Arguably, special rules for lobbyist donations are misdirected or underinclusive. Lobbyists are advocates for the legislative or regulatory goals of clients. While lobbyists may have special knowledge of the state of legislative developments and special incentives to get contributions to strategically significant legislators at specific times in order to advance a particular measure, it is a client's interest they are advancing. As such, it is not clear why lobbyists' contributions present a greater risk of corruption than the contributions from the firms, organizations, associations or individuals they represent. Some jurisdictions have recognized that lobbyists, or lobbyists alone, do not present special dangers of corruption by imposing special restrictions more broadly. Sixteen states ban all contributions during the legislative session, not just those from lobbyists.¹⁴⁵ Many states have adopted so-called "pay-to-play" laws limiting or barring donations by government contractors,¹⁴⁶ or limiting or restricting donations by businesses in certain highly regulated fields, like gambling¹⁴⁷ or the sale of alcohol.¹⁴⁸ Federal law has long imposed a complete ban on campaign contributions by federal contractors in connection with federal elections.¹⁴⁹ New York City may have adopted the most comprehensive approach, imposing very low donation limits on both lobbyists and a broad category of firms and individuals defined as "doing business" with the City, as well making donations from those

¹⁴⁵ See NCSL, "Limits on Campaign Contributions During the Legislative Session," *supra*.

¹⁴⁶ See, e.g., Perkins Coie, "Overview of State Pay-to-Play Statutes," May 5, 2010, <http://www.perkinscoie.com/overview-of-state-pay-to-play-statutes/>.

¹⁴⁷ See, e.g., *Casino Ass'n of Louisiana v. State*, 820 So.2d 494 (La. 2002).

¹⁴⁸ See, e.g., *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976).

¹⁴⁹ See 2 U.S.C. § 441c. That ban was recently upheld in *Wagner v. FEC*, 901 F.Supp.2d 101 (D.D.C. 2012). Connecticut's similar ban was upheld in *Green Party of Connecticut v. Garfield*, *supra*, 616 F.3d at 194-205.

groups ineligible for public matching funds under the City's public funding program.¹⁵⁰ These restrictions were upheld by the Second Circuit in *Ognibene v. Parkes*.

On the other hand, many experts with first-hand experience of the role of campaign contributions are convinced that there is something particularly toxic about the interaction of lobbying and campaign finance. If successful interest-group representation turns on building relationships with officials in order to get access, and lobbyists are in the business of building those relationships, then lobbyists – or at least the most successful lobbyists -- may be particularly adept at using campaign contributions to advance legislative ends. “At the very least, fundraisers are also an opportunity to check in, to get face time, and to build relationships.”¹⁵¹ Recent political science work indicates that for contract lobbyists -- that is, lobbyists hired by a variety of clients, rather than in-house lobbyists who work for a specific employer -- campaign contributions are a significant means of sustaining relationships with legislators and a marker of professional success.¹⁵² A relatively small fraction of lobbyists account for most of lobbyists' contributions. A survey by Public Citizen found that from 1998 through 2005 only one-quarter of federally registered lobbyists actually made campaign contributions in excess of \$200 to a single congressional candidate or PAC, but that 6% of all lobbyists accounted for 83% of all lobbyists' campaign contributions, and that these superdonors were also major bundlers.¹⁵³

¹⁵⁰ The business dealings that trigger the “doing business” rule include holding contracts with the City worth \$100,000 or more; applications for approval of transactions involving office space, land use or zoning changes; certain high value concessions and franchises; grants above a dollar threshold; the acquisition or disposition of real property; economic development agreements; contracts for the investment of pension funds; and transactions with lobbyists. See N.Y.C. Admin Code § 3-702(18).

¹⁵¹ Dorie Apollonio, Bruce Cain & Lee Drutman, *Access and Lobbying: Beyond the Corruption Paradigm*, 36 *Hastings Const. L.Q.* 13, 37 (2008).

¹⁵² Marianne Bertrand, Matilde Bombardini, Francesco Trebbi, “Is It Whom You Know or What You Know? An Empirical Assessment of the Lobbying Process,” ERLINK, <http://ssrn.com/abstract=1748024> (Jan. 2011 draft).

¹⁵³ Public Citizen, *The Bankrollers: Lobbyists' Payments to the Lawmakers they Court, 1998-2006* (2006),

Moreover, while it might make sense to apply the notion of special influence beyond lobbyists to include contractors or others doing business with government, it ought not be fatally underinclusive for a government to take the more limited step of focusing on the corruption and appearance of corruption concern posed by the campaign activity of those whose business it is to influence government action.

Even if lobbyists are not necessarily a group more likely to convert campaign support into undue influence, recent evidence of government corruption involving lobbyists in a specific jurisdiction, as in North Carolina, can provide support for tighter restrictions on lobbyists in that jurisdiction. On the other hand, as the Connecticut example suggests, the absence of recent local scandals involving lobbyists may be a reason for finding that more stringent laws impose an unjustified burden on First Amendment rights.

The specific restriction in question also matters. As *Ognibene*'s distinguishing of *Green Party* demonstrates, lower contribution limits pose less constitutional difficulty than sweeping contribution bans. Concerns about improper and unfair influence would also be particularly well-served by restrictions that focus on the nature of the relationship a campaign finance activity establishes between the lobbyist and the candidate, and the likelihood that the campaign support will be reciprocated through influence on official action. An individual campaign contribution -- which in most jurisdictions is subject to a dollar limit -- is unlikely to have a major effect on an officeholder. People active in the legislative process regularly make contributions not because they particularly support the candidates to whom they are donating but because it has become a precondition for lobbying practice. Making a campaign contribution is often considered a cost of doing legislative business, and it is not uncommon for a donor to give

<http://www.citizen.org/documents/BankrollersFinal.pdf>.

to both parties and competing candidates in the same election.¹⁵⁴ Such a campaign contribution may have a positive impact on a relationship with an elected official – as well as avoiding a negative implication from not having made a contribution – but the impact may not be great. On the other hand, direct involvement in a candidate’s campaign – such as by serving as a treasurer or on the finance committee -- suggests real personal support which may be more likely to be recognized and honored by an officeholder. Campaign activities which involve a distinct personal role for the lobbyist may tend to forge a link between the lobbyist and the candidate which subsequently gives the lobbyist extra influence. As a result, restrictions on such a campaign role may be justified. Bundling arguably falls between these extremes. Although bundling or other forms of fundraising may be less of a commitment than service as a campaign treasurer or other officer, bundling or fundraising over a threshold level can represent a more significant level of support for a candidate than merely making a personal contribution. There might, thus, be a good case to prohibit lobbyists from bundling for candidates running for office or to limit how much a lobbyist may bundle.

IV. Substantive Regulation on Lobbying: Contingent Fees and the Revolving Door

A. Contingent Fees¹⁵⁵

¹⁵⁴ Shrewd lobbyists may limit the size of their initial donations in an election cycle below the maximum allowable amount so that the elected official “has to call again to ask for another contribution. It creates another opportunity to talk.” Kent Cooper, “Lobbyists Keep Freshmen Coming Back for More Checks,” Roll Call, Political MoneyLine Blog, May 6, 2013.

¹⁵⁵ On the regulation of lobbyists’ contingent fees, *see generally* Stacie L. Fatka and Jason Miles Levien, Note, Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution, 35 Harv. J. Legis. 559 (1998); Meredith A. Capps, Gouging the Government: Why a Federal Contingent Fee Lobbying Prohibition is Consistent with First Amendment Freedoms, 58 Vand. L. Rev. 1885 (2005); Thomas M. Susman & Margaret Martin, Contingent Fee Lobbying: Inflaming Avarice or Facilitating Constitutional Rights?, 31 Seton Hall Legis. J. 311 (2006); NCSL, Ethics: Contingency Fees for Lobbyists, <http://www.ncsl.org/default.aspx?tabid=15351> (June 2010).

General federal lobbying regulations do not restrict the use of contingent fees in the compensation of lobbyists,¹⁵⁶ but forty-three states prohibit the practice and a forty-fourth restricts it.¹⁵⁷ As noted in Part II, courts have long treated contingent fee arrangements for lobbyists as void for public policy on the theory that they create an incentive for lobbyists to use improper means to influence government action. Some modern court decisions continue to support restrictions on contingent fees. Within the last two dozen years, the United States Court of Appeals for the Eleventh Circuit and the Supreme Court of Kentucky have rejected facial challenges to state laws banning the payment of contingent fees to lobbyists; a Florida state court found a lobbyist contingent fee arrangement to be void for public policy; and Maryland's highest court permitted an enforcement action by the state ethics board to go forward against a lobbyist who inserted a contingent fee provision in his contract, although the court split over a procedural question in the case.¹⁵⁸ On the other hand, in a case decided in the 1980s, the Montana Supreme Court concluded that a "blanket prohibition against contingent compensation of lobbyists" is unconstitutionally overbroad and "infringes the rights of those who, while contemplating neither illegal nor unethical conduct, need or desire to employ a lobbyist on a contingent fee basis in order to advance their interests before a public official."¹⁵⁹

¹⁵⁶ However, federal procurement contracts other than those awarded by sealed bids are required to contain a "Covenant against Contingent Fees," in which government contractors warrant that contingent fees were not used to secure the contract. See ABA Task Force Report, *supra*, at 27.

¹⁵⁷ See NCSL, "Ethics: Contingency Fees for Lobbyists" (updated March 2013).

¹⁵⁸ See *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996); *City of Hialeah Gardens v. John L. Adams & Co.* 599 So.2d 1322 (Fla. Ct. App. 1992); *Assoc'd Indus. of Kentucky v. Comm.*, 912 S.W.2d 947, 951 (Ky. 1995); *Bereano v. State Ethics Comm.*, 944 A.2d 538 (Md. 2008).

¹⁵⁹ *Montana Automobile Assn. v. Greely*, 632 P.2d 378, 392-94 (Mont. 1981).

Modern First Amendment doctrine poses difficulties for a ban on contingent fee lobbying. In *Meyer v. Grant*¹⁶⁰ the Supreme Court invalidated under the First Amendment a Colorado law banning payments to people who circulated the petitions used to gather signatures to place an initiative question on the ballot. Barring the use of paid circulators reduced the number of people willing to carry petitions and the number of people they could reach with their message, thereby making it more difficult to qualify initiatives for the ballot. The Court held that the restriction could not be justified by the state's interest in assuring that an initiative has sufficient grass roots support to be placed on the ballot or - more pertinent to the contingent fee for lobbying question - its interest in protecting the integrity of the initiative process. The former interest was held to be adequately protected by the signature requirement itself, while the latter was held to be adequately addressed by laws criminalizing the forging of petition signatures, making false or misleading statements to obtain a signature, or paying someone to sign a petition.¹⁶¹ Similarly, in a series of cases involving charitable solicitations, the Court struck down state laws limiting the percentage of charitable donations collected that could be used to defray solicitation costs or pay professional fundraisers.¹⁶² Limiting the expenditure of funds used to solicit funding was treated as a limitation on the speech involved in solicitation. The principal justification offered by the states in these cases was the prevention of fraud, but the Court emphasized that the anti-fraud goal could be attained by laws targeting fraud itself or

¹⁶⁰ 486 U.S. 414 (1988).

¹⁶¹ Id. at 425-27.

¹⁶² See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

requiring charities to file financial disclosure reports, so that the limits on compensation were not narrowly tailored to the fraud-prevention interest.

To the extent that a prohibition on contingent fee compensation makes it more difficult for some individuals or groups to hire a lobbyist or reduces communications made by lobbyists to government officials on their behalf, a prohibition on contingent fees infringes on First Amendment rights. The principal justification traditionally given for the restriction is that by tying compensation to success contingent fees create an incentive for a lobbyist to use improper or corrupt means, but the comparable anti-fraud argument has not fared well in the petition circulation and charitable solicitation contexts, where the Court's response has been that limits on compensation are overbroad and anti-fraud laws can do the job. To be sure, the Court in the campaign finance cases has held that Congress and the states can use campaign contribution restrictions to address concerns about corruption and the appearance of corruption that fall short of outright bribery or the payment of illegal gratuities, but contribution restrictions (and gift restrictions) apply directly to interactions with elected officials, whereas contingent fee prohibitions apply only to private contracts (although they reflect a concern about the ultimate impact of such fee arrangements on public actions). The contingent fees themselves, thus, do not literally involve the corruption of government officials. The claim, rather, is the more attenuated one that they create an incentive to lobbyists to take actions that improperly influence the officials they lobby. Still, given the extensive body of older Supreme Court case law invalidating lobbyist contingent fees, lower courts have been reluctant to strike down prohibitions on

contingent fees in the absence of a modern Supreme Court case applying the First Amendment to such contingency fee arrangements.¹⁶³

Even apart from the constitutional question, the case for regulating lobbying contingent fees is uncertain. Contingent fees are regularly used in the hiring of counsel and have proven to be a means of enabling the less affluent to obtain representation for their interests. As the ABA Task Force Report noted “[t]he opportunity to resort to a contingency fee contract may enable some private persons to obtain representation that they could not otherwise afford. . . . In this regard, contingency fee arrangements may promote norms of equal access to justice.”¹⁶⁴ It is not clear if any empirical work has been done concerning whether contingent fees are either useful in obtaining lobbying representation or in fueling misconduct.

Permitting contingency fees, but requiring disclosure¹⁶⁵ of such arrangements -- as provided by a handful of states -- would surely pass constitutional muster. Adding such a requirement to existing disclosure laws would place little new burden on those required to register and report, and would be unlikely to curtail the availability of representation. Disclosure would also provide useful information concerning how widespread contingent fee arrangements are; how large the payments are; what types of clients use them; whether this arrangement

¹⁶³ See, e.g., *Capital Keys, LLC v. Ciber, Inc.*, 875 F.Supp.2d 59, 63-65 (D.D.C. 2012); *Florida League of Professional Lobbyists*, supra, 87 F.3d at 462.

¹⁶⁴ ABA Task Force Report, supra, at 28. The Report proposed a limited federal ban on contingent fees “where the object of the lobbying is to obtain an earmark, tax relief, or similar authorization of a targeted loan, grant, contract, or guarantee.” *Id.* at 27. According to the Report, “[w]here the lobbyist is seeking a narrow financial benefit for the client, the temptations for unethical behavior are probably at their greatest. The appearance of unseemliness, driven by public apprehensions about a possible corrupt exchange, is likely to be particularly strong in that setting also, as taxpayer dollars are directly involved.” *Id.* However, it is not clear why the incentive for misconduct *by the lobbyist* would be greater when the benefit is narrowly targeted to certain individuals or interests. One would think that the incentive for misconduct would be greater when the fee is greater, which might occur when the legal, regulatory, or tax change benefits an entire industry or economic sector rather than an individual firm.

¹⁶⁵ This is the law in Montana, *see* NCSL, *Contingency Fees for Lobbyists*. The ABA Task Force Report also recommends the adoption of a contingency fee reporting requirement for federal lobbyists. See ABA Task Force Report, supra, at 28.

actually makes representation more available to less affluent interests and organizations; and whether there is any correlation between contingent fees and misconduct.

B. Revolving Door Restrictions¹⁶⁶

As one scholar has put it, “[p]erhaps no problem in government ethics is easier to understand or more difficult to address effectively, than that posed by revolving-door employment,”¹⁶⁷ that is, the hiring as lobbyists of former government officials upon their leaving public office. “Lobbying and other advocacy groups seek out former members [of Congress] in order to gain an advantage over the opposition.”¹⁶⁸ “The risk is obvious that a client represented by a public-servant-turned-lobbyist will have, or will appear to have, an unfair advantage in petitioning the government.”¹⁶⁹

This unfair advantage can take many forms. “A former lawmaker may know about a Senator’s family or a House member’s parochial concerns, insights that help advocates make quick personal connections while pressing a policy position. They also have better prospects for getting a private meeting with their former Senate or House colleagues.”¹⁷⁰ As former Solicitor

¹⁶⁶ The literature on the lobbyist revolving door issue is enormous. *See, e.g.*, Robert G. Vaughn, “Post-Employment Restrictions and the Regulation of Lobbying by Former Employees,” chapter 24 of William V. Luneburg and Thomas M. Susman, *The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers and Lobbyists* (3d ed. 2005); Note, “Post-Employment Lobbying Restrictions on the Legislative Branch of Government: A Minimalist Approach to Regulating Ethics in Government,” 65 Wash. L. Rev. 883 (1990); Michael H. Chang, “Protecting the Appearance of Propriety: The Policies Underlying the One-Year Ban on Post-Congressional Lobbying Employment,” 5 Kan. J. L. & Pub. Pol. 121 (1995); Daniel G. Webber, Jr., “Proposed Revolving Door Restrictions: Limiting Lobbying by Ex-Lawmakers,” 21 Okla. City U.L. Rev. 29 (1996); Jeni L. Lassell, “The Revolving Door: Should Oregon Restrict Former Legislators From Becoming Lobbyists?” 82 Ore. L. Rev. 979 (2003).

¹⁶⁷ Vincent Johnson, *Regulating Lobbyists: Ethics, Law and Public Policy*, 16 Cornell J. L. & Pub. Pol. 1, 32 (2006).

¹⁶⁸ Jonathan D. Salant, “Congress Members Sprint for Money to Lobby After Election,” www.bloomberg.com, May 8, 2013.

¹⁶⁹ Johnson, *supra*.

¹⁷⁰ Salant, *supra*.

General and Watergate Special Prosecutor Archibald Cox put it, “the ex-official lobbyist comes as a friend, an insider.”¹⁷¹ Sometimes, the ex-official may literally have better physical access, if, for example, a legislature continues to give former members special access to legislative facilities. So, too, as Cox explained, “the ex-official will often be able to trade upon habits of deferring to his advice and wishes engendered during the days when he was senior to, or at least a more influential official than those with whom he now deals in a different capacity.” Sometimes the ex-official will have special knowledge or inside information about the matter subject to potential government action which will give her an edge over other lobbyists. Beyond the possibility of unfairness to other interests seeking government action, the potential for post-public-service employment as a lobbyist may affect the decisions of government officials while in office, who may be “tempted to curry favor with prospective employers or clients.”¹⁷²

As a result, Congress, many state legislatures, and a number of cities have adopted “revolving door” rules or “cooling off” periods limiting for a time the ability of former government officials to lobby the government offices where they were once employed.¹⁷³ The Senate’s revolving door rule played a role in the scandal that led to the 2011 resignation of Senator John Ensign (R-Nev). Ensign was having an affair with the wife of his administrative assistant, Doug Hampton. When Hampton found out, Ensign helped Hampton establish himself as a lobbyist by finding him clients. Hampton then contacted Ensign’s office on behalf of those

¹⁷¹ Quoted in Chang, *supra*.

¹⁷² *Id.*

¹⁷³ See, e.g., *see generally* Jack Maskell, “Post-Employment, ‘Revolving Door,’ Laws for Federal Personnel,” Congressional Research Service Report for Congress, 7-5700 (Sept. 13, 2012); NCSL, “‘Revolving Door’ Prohibitions Against Legislators Lobbying State Government After They Leave Office,” updated December 2012.

clients in violation of the anti-revolving door rule, and was eventually indicted for violating the revolving door prohibition.¹⁷⁴

The content of these restrictions vary significantly with respect to who is restricted; which offices, agencies, or branches of government they are restricted from lobbying; and how long and with respect to what matters the restriction applies. The most consistently accepted principles are (i) that former members of government should not be allowed to lobby with respect to matters with which they were personally and substantially involved as government employees, and (ii) that former government officers should not be able to lobby the particular offices or agencies where they were employed for a specific, limited period of time, typically one or two years. At the federal level, revolving door restrictions were initially aimed at members of the executive branch under the 1978 Ethics in Government Act, and the rules governing former executive branch officials vary considerably according to the level of the former official's employment, the subject matter of his or her public service, and the nature of the representation in question. Congress began to regulate lobbying by former members of Congress and their staffs in the Ethics Reform Act of 1989, which also strengthened the limits on former members of the executive branch. HLOGA adopted or extended a number of revolving door restrictions so that former Senators are now barred from lobbying Congress for two years after leaving office and former members of the House of Representatives are barred from lobbying Congress for one year after leaving office. Higher-paid congressional staffers, including both staff to members of

¹⁷⁴ See Jennifer Yachnin and Kate Ackley, "Hampton Case a Reminder of Revolving Door Crimes," Roll Call, March 28, 2011.

Congress and staff to committees, leadership, and legislative offices are subject to a one-year restriction on lobbying the offices or committees where they had been employed.¹⁷⁵

Revolving door restrictions have been questioned as both too restrictive and not restrictive enough. On the one hand, they constrain the employment opportunities of former government officials as well as limit the ability of private individuals and groups to retain as lobbyists individuals who may be uniquely well-informed about their issues and well-qualified to represent them. This could discourage some capable people from government service, particularly legislative staff members who do not enjoy civil service protections and whose jobs are subject to unpredictable political changes. The exclusion of former legislators and staffers knowledgeable about both the policy content of and legislative process for important issues is also a cost. On the other hand, many existing revolving door restrictions are weak. The typical one-year rule may not be long enough to curb unfair influence. Moreover, former members of Congress have demonstrated they can escape revolving door restrictions by avoiding the direct contacts with the legislature necessary to fall within the statutory definition of lobbying and instead providing “strategic consulting” services to clients. Former Senator Christopher Dodd demonstrated this when he became chairman and chief executive for the Motion Picture Association of America; -- in other words, Hollywood’s top lobbyist,-- less than three months after leaving office, despite the Senate’s two-year revolving door rule. As Senator Dodd explained, he saw his job “as an architect of legislative strategy.” “There are other people here who do that,” he said of direct lobbying efforts.¹⁷⁶

¹⁷⁵ See Maskell, *supra*, at 10-13.

¹⁷⁶ Brooks Barnes and Michael Cieply, Motion Picture Industry Group Names Ex-Senator Dodd as Its New Chief, *N.Y. Times*, March 1, 2011. To be sure, Senator Dodd’s case is not unusual and top in-house lobbyists are often not lobbyists within the meaning of lobbying laws even when revolving door restrictions are not at issue. See, e.g.,

There is relatively little case law dealing with revolving door restrictions, perhaps because they have generally been considered constitutionally unproblematic. An early Seventh Circuit decision rejected a due process challenge to the federal criminal law provision barring a former government official from representing a client before the government with respect to a matter in which the former official had been substantially involved while in government, finding that the “statute proscribes as precisely as possible an unethical practice that can manifest itself in infinite forms.”¹⁷⁷ Similarly, an Ohio court upheld that state’s one-year revolving door rule, at that time aimed only at executive branch personnel, finding the “state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.”¹⁷⁸ A more recent federal district court decision in Ohio treated revolving door laws as creating a more serious constitutional issue. *Brinkman v. Budish*¹⁷⁹ enjoined the enforcement of Ohio’s revolving door law, which had been expanded to bar former members of the state legislature and former legislative employees from representing any person on any matter before the legislature or legislative committees for a period of one year after the conclusion of the member or employee’s legislative service. *Brinkman* involved a former legislator who was also a member of an anti-tax advocacy organization and sought to represent that organization, on an uncompensated basis, before the

Edward Wyatt, AT&T Lobbyist Faces Beltway Test in T-Mobile Deal, N.Y. Times, March 26, 2011 (AT&T’s senior vice president for external and legislative affairs – the company’s chief lobbyist-- is technically not a lobbyist). See also Juliet Eilperin and Tom Hamburger, “For Obama’s ex-aides, it’s time to cash in on experience,” Washington Post, May 30, 2013 (noting that many ex-officials take positions as consultants and media advisers not subject to the revolving door rules applicable to lobbying).

¹⁷⁷ United States v. Nasser, 476 F.2d 1111, 1115 (7th Cir. 1973).

¹⁷⁸ State v. Nipps, 419 N.E.2d 1128, 1132 (Ohio App. 1979).

¹⁷⁹ 692 F.Supp.2d 855 (S.D. Ohio 2010).

legislature within the statutory one-year period. Finding that the revolving door rule burdened the organization's right to retain a representative of its choosing, the court subjected the law to strict judicial scrutiny. The court agreed that the goals of preventing unethical practices of public employees and public officials, and promoting, maintaining, and bolstering the public's confidence in the integrity of state government are compelling government interests, but held, without explanation, that they are not compelling with respect to *uncompensated* lobbying.¹⁸⁰ A third interest advanced by the government -- "to prevent unequal access to the General Assembly by outside organizations by virtue of any significant relationships with current and former public officials who may be in a position to influence government policy"-- was held not to be a compelling interest at all.¹⁸¹ The court reasoned that *Citizens United*'s rejection of the idea "that political corruption necessarily follows from the fact that a speaker may be favored or have special access to elected officials" eliminates the prevention-of-unfair-access justification for revolving door laws.¹⁸²

Brinkman's assertion that *Citizens United* precludes the unequal special access justification for revolving door laws is unpersuasive. Revolving door laws are much more tightly limited than the spending ban at issue on *Citizens United*. The "cooling off" period requirement targets only communications by former government officials to current government officials for a limited time or with respect to a limited set of matters. The former official is free to speak about government matters to the public, or when not seeking to influence legislative action, during the revolving door period and entirely free thereafter. So, too, the burden on the individuals and organizations that would retain ex-officials as advocates is light. They are free to

¹⁸⁰ Id. at 863.

¹⁸¹ Id. at 864.

¹⁸² Id.

hire anyone other than a recent ex-official to represent them to the legislature, and to hire anyone they want to communicate their views to the public about matters before the legislature. The burden on political expression is, thus, quite modest – probably less than that posed by contingent fee restrictions, which may make counsel entirely unavailable to less affluent clients. The prevention of unequal access based on prior government service is an appropriate regulatory goal consistent with the longstanding purposes of lobbying laws to promote public-regarding government decisions and public confidence in government. Indeed, the essence of the nineteenth and early twentieth century anti-lobbying decisions – the reliance on personal importunities, private solicitation, and the use of inside knowledge – is at the heart of the rationale for the revolving door ban, and would apply even to uncompensated lobbying.

Despite its result, *Brinkman* recognizes that revolving door laws are justified by traditional concerns about government ethics and public confidence in government. Certainly, the narrower rules prohibiting representations with respect to specific matters in which the official was involved are grounded in traditional conflict of interest principles barring representatives from switching sides in the same case. *Brinkman* is a useful reminder that lobbying restrictions generally trigger First Amendment review and that there may be a First Amendment outer limit to revolving door restrictions but that most revolving door restrictions are likely to pass muster. The court, however, erred in its unjustified extrapolation from *Citizens United* and its resulting unduly narrow definition of the public interests that can justify limited lobbying regulation.

A recent development in this area has been the emergence of “reverse revolving door” rules limiting the hiring of lobbyists into government positions. At the start of his administration, President Obama issued an executive order barring – subject to waivers -- the hiring of a lobbyist

for a position in an agency the lobbyist had lobbied in the preceding two years and requiring any former lobbyist to recuse himself for two years from participating in any matters or policy areas in which the lobbyist had participated in the two years prior to the executive branch appointment.¹⁸³ Thereafter the White House issued a memorandum directing the heads of executive departments and agencies not to appoint federally registered lobbyists to serve on advisory boards and committees.¹⁸⁴

It is difficult to see the case for a blanket ban on the reverse revolving door appointment of lobbyists to full-time positions. Presumably, the appointee's prior service as a lobbyist would be known to both those making the appointment and to the Senate if the position requires Senate confirmation. If the knowledge, experience, and perspective the person brings to the position is attractive, it is hard to see why prior service as a lobbyist should be disqualifying per se, although closeness to a particular organization, industry, or special interest group might be a factor taken into account in the decision to appoint or confirm.¹⁸⁵ If the concern is that the appointee would subsequently exploit the position when he or she leaves the government that could be addressed by the traditional revolving door rule.

On the other hand, requiring former lobbyists to recuse themselves from specific matters on which they had lobbied is completely appropriate as the prospect of a conflict of interest in that situation is very real. So, too, restrictions on the appointment of lobbyists to part-time positions makes some sense as there could be a legitimate concern that a lobbyist who simultaneously holds high government office might have an unfair advantage in seeking to

¹⁸³ Executive Order 13490 (Jan. 21, 2009).

¹⁸⁴ See U.S. General Services Administration, Registered Lobbyists Serving on Advisory Committees, June 24, 2010.

¹⁸⁵ See, e.g., Timothy B. Lee, "Lobbyists becoming public officials isn't as bad as the other way around," Washington Post, June 20, 2013.

influence government action. On the other hand, some advisory bodies are structured to permit representation of industries, organizations, or interest groups affected by the recommendations or decisions of those bodies. Moreover, as with the question of special limits on campaign contributions it is debatable whether the problem of improper special interest influence is more acute for lobbyists than for other individuals whose private sector positions give them a stake in government actions. The United States Court of Appeals for the District of Columbia Circuit noted these issues when it reversed a lower court's dismissal of a challenge by federally registered lobbyists who were interested in being appointed to the Industry Trade Advisory Committees ("ITACs") authorized by the Trade Act of 1974 to President Obama's executive order barring registered lobbyists from serving on a wide range of advisory boards and commissions, including the ITACs. Emphasizing that "registered lobbyists are protected by the First Amendment right to petition," the court found the plaintiffs "plausibly alleged that the ban pressures them to limit their constitutional right" and so "pled a viable First Amendment unconstitutional conditions claim."¹⁸⁶ As the court explained, the ITACs were created "for the very purpose of reflecting the viewpoints of private industry."¹⁸⁷ Remanding without passing expressly on the merits of the claim, the court noted the government's argument that the ban was intended to change the "culture of special-interest access," but observed skeptically that ITAC members are intended to "serve in a *representative* capacity," and then directed the district court on remand to "ask the parties to focus on the justification for distinguishing . . . between

¹⁸⁶ *Autor v. Pritzker*, ___ F.3d ___ (D.C. Cir., Jan. 17, 2014), slip op. at 10-12.

¹⁸⁷ *Id.* at 3.

corporate employees (who may represent their employers on ITACs) and the registered lobbyists those same corporations retain (who may not).¹⁸⁸

V. Disclosure

Disclosure laws generally require lobbyists to register with some oversight body and then submit periodic reports concerning the identities of their clients, the funds they receive and spend, and the subjects with respect to which they lobby. Disclosure -- indeed, any regulation of lobbying -- requires a definition of what constitutes the “lobbying” subject to regulation. The most significant unresolved issue in the definition of lobbying is whether “indirect” lobbying or so-called “grassroots activities” -- that is, communications aimed not directly at public officials but at the public in order to get people to contact lawmakers with respect to pending or proposed government actions -- should be treated as “lobbying” subject to disclosure. Other current disclosure issues include whether lobbyists should be required to report more information concerning the specific officials they lobby and concerning the sources of the funds used to pay for their activities.

A. Grassroots Lobbying

As Dean Allard has explained, effective lobbying includes “efforts to inform and leverage public opinion on an issue in order to shape political outcomes. Indirect advocacy involves research institutions, education and public relations campaigns, mobilization and strategic communication efforts, and coalition building, all of which take place outside of the legislative chamber, but with obvious indirect effects.”¹⁸⁹ The use of television and digital and social media campaigns to “build support among voters and key elites” to influence legislative

¹⁸⁸ Id. at 13-14.

¹⁸⁹ Allard, *supra*, 19 Stan. L. & Pol. Rev. at 48-49.

activity is increasingly integral to modern lobbying.¹⁹⁰ Thomas Susman has pointed out that “[g]rassroots organizing and public relations campaigns also accompany rulemaking proceedings” in addition to legislative lobbying, and that with the rise of Internet organizing, websites, blogs, banners, and more, grassroots lobbying has become more technologically sophisticated and widespread.¹⁹¹ Professor William Luneburg observes that “exhortations to the public at large or various sectors thereof to contact Congress or the federal bureaucracy on an issue or particular legislation or regulation is omnipresent today, particularly given the ease of Internet access to persons who may react favorably to the exhortations and, with a few mouse clicks and not much more effort, send the requested message or an edited version through cyberspace to the requested target.” In his view, lobbying disclosure that omits grassroots activity is “seriously incomplete assuming, as most commentators do, that it can contribute significantly to the success of lobbying campaigns.”¹⁹² On the other hand, some activists and scholars have opposed regulation of grassroots lobbying. Jay Alan Sekulow and Erik Zimmerman of the American Center for Law and Justice have emphasized that “[g]rassroots issue advocacy increases citizen participation in the democratic process by encouraging Americans to exercise their right to inform their elected representatives about their positions on important issues.” In their view, any regulation of grassroots lobbying, by imposing administrative requirements with the attendant costs of compliance and penalties for noncompliance, would significantly hamper ordinary citizens’ political activity, in violation of

¹⁹⁰ See Edsall, *The Shadow Lobbyist*, *supra*.

¹⁹¹ Thomas M. Susman, *Lobbying in the 21st Century – Reciprocity and the Need for Reform*, 58 Admin L. Rev. 737, 742, 744-45 (2006).

¹⁹² William V. Luneburg, “Anonymity and its Dubious Relevance to the Constitutionality of Lobbying Disclosure Regulation,” 19 Stan. L. & Pol. Rev. 69, 102 (2008).

the First Amendment.¹⁹³

Federal lobbying law does not apply to grassroots lobbying,¹⁹⁴ but most state lobbying disclosure laws do cover some grassroots lobbying activity. One 2009 study concluded that all but thirteen states require reporting concerning some indirect lobbying expenditures.¹⁹⁵ Unsurprisingly, a number of these laws have been challenged in court, but courts have nearly always upheld these requirements.

In *Young Americans for Freedom, Inc. v. Gorton*, the Washington Supreme Court in 1974 rejected a challenge to the Washington State law enacted two years earlier that required disclosure of grassroots lobbying campaigns involving the expenditure of more than \$500 within three months or \$200 in one month “in presenting a program addressed to the public, a substantial portion of which is designed or calculated primarily to influence legislation.” The court found the requirement advanced the informational function generally justifying lobbying disclosure. Indeed, it concluded that striking down the law “would leave a loophole for indirect lobbying without allowing or providing the public with information and knowledge re the sponsorship of the lobbying and its financial magnitude.”¹⁹⁶ Two years later, the Michigan Supreme Court in an advisory opinion that addressed a host of challenges to a proposed campaign finance, government ethics, and lobbying measure found it would be permissible to treat as lobbying subject to disclosure “soliciting others to communicate with an official in the

¹⁹³ Jay Alan Sekulow & Erik M. Zimmerman, “Weeding Them Out By the Roots: The Unconstitutionality of Regulating Grassroots Issue Advocacy,” 19 Stan L. & Pol. Rev. 164, 165 (2008). Cf. Lloyd Hitoshi Mayer, “What is This ‘Lobbying’ That We Are All So Worried About?” 26 Yale L. & Pol. Rev. 485, 558-60 (2007) (discussing the benefits of grassroots lobbying in informing the public about pending legislative and regulatory issues).

¹⁹⁴ However, the prohibition on section 501(c)(3) organizations engaging in lobbying includes grassroots lobbying.

¹⁹⁵ Chip Nielsen, Jason D. Kaune, Jennie Unger Eddy, “State Lobby and Gift Laws,” Practicing Law Institute, Corporate Law and Practice Course Handbook Series, 1760 PLI/Corp 677 (2009).

¹⁹⁶ *Young Americans for Freedom, Inc. v. Gorton*, 522 P.2d 189, 192 (Wash. 1974).

legislative branch or an official in the executive branch for the purpose of influencing legislative or administrative action” above the statutory dollar threshold, provided that the definition was “interpreted to mean express and direct requests to so communicate.”¹⁹⁷

The federal courts of appeals for the Eighth and Eleventh Circuits, addressing challenges to the lobbying disclosure laws of Minnesota and Florida, respectively, rejected claims that regulating grassroots lobbying is unconstitutional. The Minnesota law defined lobbying to include “attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.” The National Rifle Association asserted it would be unconstitutional to require it to report concerning letters and mailgrams the organization sent to its Minnesota members urging them to contact their state legislators with respect to certain legislative items. The Eighth Circuit, however, rejected the claim, finding that “when persons engage in an extensive letter writing campaign for the purpose of influencing specific legislation, the State’s interest is the same whether or not those persons are members of an association.”¹⁹⁸

The Eleventh Circuit has twice upheld Florida’s grassroots lobbying disclosure requirements. In *Florida League of Professional Lobbyists, Inc. v. Meggs*,¹⁹⁹ in 1996, the court observed that the governmental interest in disclosure of indirect lobbying efforts, including media campaigns may in some ways be stronger than the case for disclosure of direct lobbying because “when the pressures are indirect . . . they are harder to identify without the aid of disclosure requirements.”²⁰⁰ In 2008, the court rejected a challenge to Florida’s requirement that lobbyists report indirect communications, which the court noted might include opinion articles,

¹⁹⁷ Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 242 N.W.2d 3, 23 (Mich. 1976).

¹⁹⁸ Minnesota State Ethical Practices Board v. National Rifle Ass’n, 761 F.2d 509, 512-13 (8th Cir. 1985).

¹⁹⁹ 87 F.3d 457 (11th Cir. 1996).

²⁰⁰ Id. at 461.

issue advertisements and letter writing campaigns from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy. The court concluded that the requirement was justified by the compelling interest in voters being able to appraise “the integrity and performance of officeholders and candidates.”²⁰¹

The only court decision going the other way is *Montana Automobile Assn. v. Greely*,²⁰² in which the Montana Supreme Court struck down the provision of Montana’s law that defined as a “principal” not only someone who spends more than \$1000 a year to engage a lobbyist but also a person “other an individual” who spends above that threshold amount “to solicit, directly or indirectly or by an advertising campaign, the lobbying efforts of another person.” The court found that this could include the efforts of various organizations to ask their members to contact public officials with respect to legislation, and concluded there was no compelling state interest that would justify the burden on First Amendment rights such a provision would impose.²⁰³

The argument that applying disclosure requirements to grassroots lobbying is unconstitutional relies primarily on the sentence in *Harriss* construing the Federal Regulation of Lobbying Act of 1946 (“FRLA”) “to refer only to lobbying in its commonly accepted sense; to direct communication with members of Congress on pending or proposed federal legislation”²⁰⁴ and the comparable reading of the FRLA by *Rumely*²⁰⁵ on which *Harriss* relied and quoted. But *Harriss* and *Rumely* are actually consistent with mandatory disclosure of at least some grassroots lobbying campaigns.

²⁰¹ Florida Assn. of Professional Lobbyists, Inc. v. Division of Leg. Information Services, 525 F.3d 1073, 1080 (11th Cir. 2008).

²⁰² 632 P.2d 300 (Mont. 1981).

²⁰³ Id. at 306-08.

²⁰⁴ *Harriss*, supra, 347 U.S. at 620.

²⁰⁵ *Rumely*, supra, 345 U.S. at 47.

First, *Harriss* does not say that requiring the disclosure of grassroots activity would be unconstitutional, only that it could raise a more substantial constitutional question than disclosure with respect to direct contacts with legislators and legislative staff. Invocation of the constitutional avoidance canon reserves the constitutional question; it does not resolve it.

Second, and more importantly, *Harriss* actually treats at least some grassroots lobbying as part of “lobbying in its commonly accepted sense.” The very next sentence after the one just quoted states: “The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyist themselves or through their hirelings *or through an artificially stimulated letter campaign.*”²⁰⁶ At that point, the opinion’s footnote 10 cites to and quotes from the legislative history of the Act which indicates that the first of the “three distinct classes of so-called lobbyists” to which the FRLA was intended to apply consisted of “[t]hose who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts”²⁰⁷ -- in other words, grassroots lobbying. *Harriss* on its own terms, thus, appears to permit the application of disclosure requirements to at least some grassroots lobbying.

Third, the informational interest served by the regulation of direct lobbying is equally applicable to indirect lobbying. As *Harriss* found, there is an important government interest in enabling members of Congress to find out from those attempting to influence them “who is being hired, who is putting up the money, and how much.”²⁰⁸ With grassroots lobbying often a

²⁰⁶ 347 U.S. at 620 (emphasis supplied).

²⁰⁷ Id. at 620-21 (quoting from S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print, July 26, 1946, statement by Representative Monroney on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess., pp. 32-33.)

²⁰⁸ Id. at 625.

component of efforts to influence legislative and regulatory processes, disclosure of the source and scope of grassroots lobbying activities can provide valuable information both to government officials and to the general public. Indeed, as the Eleventh Circuit observed, disclosure may be more valuable here than for direct lobbying because the sponsors and extent of grassroots lobbying efforts may be much less apparent than the interests behind face-to-face lobbying.²⁰⁹

Finally, in the half-century since *Harris* the Supreme Court has repeatedly upheld federal campaign finance laws that require the reporting and disclosure of political expenditures aimed at the general public. Indeed, the Court has invoked the important public interest in informing voters about the interests behind electoral communications to uphold disclosure requirements even as it has struck down associated substantive limits on electoral expenditures. In *Buckley v. Valeo*,²¹⁰ the Court invalidated the provision of the Federal Election Campaign Act (FECA) that would have limited how much individuals or committees could spend independently (e.g., not in contributions to candidates, parties, or political action committees) to support or oppose candidates for office, but it upheld the requirement that such expenditures above a threshold amount be reported. More recently, in *Citizens United* the Court upheld the application of the requirements of the Bipartisan Campaign Reform Act (BCRA) for the reporting of independent electioneering communications above a dollar threshold to corporations even as it struck down all limits on corporate campaign spending. The Court reaffirmed its prior position that disclosure of the identity of the person, group, or organization paying for an electioneering communication advances the important public interest in voter information. Although campaign finance is not on all-fours with lobbying, the two forms of political engagement are similar and

²⁰⁹ Florida League of Professional Lobbyists, Inc., 87 F.3d at 461.

²¹⁰ 424 U.S. 1 (1976).

have been treated by the Court as triggering similar constitutional concerns. As a result, the Court's determination that disclosure of the financing of electoral communications aimed at the public does not violate the First Amendment would support a determination that at least some disclosure of grassroots lobbying would be constitutional as well.

Nor is judicial support for disclosure limited to candidate elections. The Supreme Court has clearly indicated, albeit without expressly deciding, that disclosure requirements can be applied to organizations seeking to influence the public in ballot proposition elections.²¹¹ The courts of appeals have regularly upheld the constitutionality of state laws requiring financial disclosures by committees active in ballot proposition campaigns.²¹² Ballot committee campaigns to influence voter decisions whether to enact or defeat proposed state laws or constitutional amendments, closely resembles grassroots lobbying to influence legislative or executive branch actions.

Applying disclosure requirements to grassroots activity raises at least two further questions. First, should such a requirement apply only to those whose direct lobbying activities have already triggered the duty to register as a lobbyist and file periodic reports, or may grassroots activity alone, without any direct contacts with legislative or executive branch officials, trigger a duty to register and report? Second, what kinds of communications aimed at the public should be treated as "lobbying," as opposed to a more general discussion or advocacy concerning public issues?

On the first question, limiting the disclosure requirement to lobbyists already required to

²¹¹ See, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792, n. 32 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (striking down limit on contribution to ballot proposition committee but noting that voter information goal could be advanced by disclosure requirement).

²¹² See, e.g., *National Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011); *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010).

register because of their direct lobbying contacts with public officials is certainly less burdensome. Mandating the inclusion of grassroots expenditures in a quarterly or semi-annual report would be a merely incremental change to a pre-existing reporting requirement rather than the addition of an entirely new regulatory obligation. By contrast, for an individual or organization not engaged in lobbying in the traditional sense, imposition of a registration and reporting requirement for the dissemination of communications aimed at the general public or the organization's members could come as a surprise and impinge on the ability to engage in political activity. However, from the perspective of providing government decision-makers or the public with information about lobbying campaigns, it does not make a difference if an organization engaged in grassroots activity is also involved in more traditional face-to-face lobbying. Limiting a registration and reporting requirement to grassroots expenditures above a fairly high dollar threshold, however, would mitigate the burden by focusing the obligation on individuals or organizations engaged in a significant level of activity.²¹³ These are also the lobbying programs for which the public information value of disclosure is greatest.

The second question resembles the issue central to campaign finance regulation over how to distinguish between electioneering communications which may be subject to disclosure requirements and general political speech about issues – including communications that may mention candidates -- that is not considered to be electioneering and therefore not subject to disclosure. In the lobbying context, disclosure could be limited to (i) communications that refer to a specific bill or a clearly identified pending or proposed executive or legislative action, or (ii)

²¹³ The ABA Task Force Report endorsed a version of the more limited approach to grassroots lobbying disclosure by proposing to require that only the client of a firm that is required to register under the LDA should be required to disclose grassroots lobbying expenditures. See Report, *supra*, at 13-16.

messages that expressly call on listeners, viewers, or readers to contact a government official. The first approach has the benefit of limiting regulation to communications addressing relatively determinate government actions. Much as an election is a particularly focused form of political activity, limiting the definition of lobbying to communications that refer to a particular bill or other proposed official action would also limit regulation to communications that aim at a particular government decision rather than discuss public policy generally. Thus, when the Washington Supreme Court upheld that state's grassroots disclosure requirement, the court noted that under state law "reporting would not be required when the subject campaign does not have as its object the support or rejection of specific legislation."²¹⁴ The difficulty with this approach, however, would be defining a particular legislative proposal and distinguishing it from a broader legislative subject, especially as particular proposals change during the legislative process. Would a message dealing with health insurance reform be sufficiently focused to be treated as lobbying, or would it have to refer to "Obamacare," "Medicaid expansion," individual mandate, or a specific bill number to trigger an obligation to report spending?

The second approach of limiting "lobbying" to messages that expressly call on the recipient to contact government officials to urge them to take a particular action provides a clearer standard. It is more consistent with the traditional definition of lobbying as involving contacts with government officials and with the Court's express advocacy standard in campaign finance disclosure, which focuses on communications that call on the recipient to take the action of voting for or against the candidate mentioned in the message. Thus, the Michigan Supreme Court interpreted that state's proposal for the disclosure of indirect lobbying to apply only to "express and direct requests to [others to] communicate" with officials for the purpose of

²¹⁴ YAF v. Gorton, *supra*, 522 P.2d at 191.

influencing legislative or administrative action.²¹⁵ This approach is also more consistent with *Rumely*. As the Court explained, the activity of Rumely’s organization that attracted the attention of the House Select Committee on Lobbying Activities was “the sale of books of a particular political tendentiousness.”²¹⁶ There was no claim that the books called on readers to contact government officials. Rather, Committee Chairman Buchanan’s concern was with “attempts ‘to saturate the thinking of the community.’”²¹⁷ The *Rumely* Court was troubled by a Congressional investigation into efforts to influence public thinking generally rather than the legislative process more specifically. Such more general efforts to affect public opinion would be exempt from regulation under a definition of grassroots lobbying that limits coverage to messages to the public which use language calling on message recipients to contact government officials.

A grassroots lobbying disclosure requirement that survives a facial constitutional attack could still be subject to an as-applied challenge. In upholding FECA’s campaign finance disclosure provision, *Buckley* observed there could be cases where an organization could show that disclosure of its activities would likely result in harassment or threats of reprisal to contributors or members. If so, the organization could obtain an exemption from even a valid disclosure law. Similar reasoning would presumably apply in the grassroots lobbying disclosure context, although given that such disclosure would likely be focused on organizational expenditures rather contributors, members, or the identities of the recipients of the organization’s messages, the need for an as-applied exception would not be likely to arise.

B. Other Disclosure Issues

²¹⁵ Advisory Op’n, *supra*, 242 N.W.2d at 23.

²¹⁶ 345 U.S. at 42.

²¹⁷ *Id.* at 47.

(1)Contact disclosure. Disclosure ought to require lobbyists to identify the government officials lobbied. For all their attention to the money spent on lobbying, relatively few disclosure laws require the reporting of the specific contacts a lobbyist makes with a legislator, staff member, or executive branch officer in the course of lobbying. Instead, disclosure laws, such as the federal Lobbying Disclosure Act,²¹⁸ tend to focus on the reporting of how much was spent on lobbying during the reporting period and on identifying the clients. A registered federal lobbyist must report on the “general issue area in which the registrant engaged in lobbying activities, specific issues upon which a lobbyist employed by the registrant engaged in lobbying activities, including, to the maximum extent practicable, a list of bill numbers and references to specific executive branches;” and “a statement of the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client.”²¹⁹ But the lobbyist need not report the specific actions requested of the officials lobbied, or identify the officials lobbied or even, the specific congressional committee or subcommittee, or the specific agency bureau, unit, or division, contacted.

Contact disclosure would require lobbyists to disclose the specific officials, or at least the specific congressional offices, congressional committees, and federal agency offices, contacted and to provide more information about the content of that contact than the number of the bill and a reference to executive branch actions. If the purpose of lobbying transparency is to serve the public interest in understanding “the efforts of paid lobbyists to influence the public decision-making process,”²²⁰ contact disclosure would be at least as valuable as disclosure of the amount of money spent on lobbying. Indeed, only contact disclosure can actually demonstrate

²¹⁸ 2 U.S.C. § 1601 et seq.

²¹⁹ 2 U.S.C. § 1604(b)(2).

²²⁰ 2 U.S.C. § 1601(3).

the links between particular lobbyists and particular elected officials or senior agency appointees. When combined with the reporting of campaign contributions and other forms of financial assistance to the same elected officials, contact disclosure could give a fuller picture of the interactions between interest groups and government. The ABA Task Force Report called for a version of contact disclosure focused on congressional offices and committees, rather than specific individuals,²²¹ and the Sunlight Foundation has developed a model Lobbying Transparency Act which would require reporting the names of the officials contacted.²²² The city of San Francisco amended its Lobbying Ordinance in 2010 to require monthly reports by registered lobbyists that include the name of each city officer with whom the lobbyist made a contact during the reporting period, the date of the contact, and the “local legislative or administrative action that the lobbyist sought to influence, including, if any, the title and file number of any resolution, motion, appeal, application, petition, nomination, ordinance, amendment, approval, referral, permit, license, entitlement, or contract, and the outcome sought by the client.”²²³

An alternative approach would be to require the officials lobbied to publicly report on their contacts with lobbyists. Professor Anita Krishnakumar proposed this in her 2007 article,²²⁴ and President Obama in his 2011 State of the Union Message called on Congress “to do what the White House has already done” and put online information about “when your elected officials

²²¹ ABA Task Force Report at 13-15.

²²² Sunlight Foundation, Real Time Online Lobbying Transparency Act, <http://publicmarkup.org/bill/real-time-online-lobbying-transparency-act/print/>.

²²³ San Francisco Lobbying Ordinance (2010) at sec. 2.110(c)(4), <http://www.sfethics.org/ethics/2009/12/lobbyist-ordinance-2010.html>.

²²⁴ Anita S. Krishnakumar, Towards a Madisonian, Interest-Group Based Approach to Lobbying Regulation, 58 Ala. L. Rev. 513 (2007).

are meeting with lobbyists”²²⁵ -- although the proposal was rejected by Congressional leaders out of hand.²²⁶ As the goal of transparency is to get a better public understanding of the interest group pressures on public officials, disclosure by officials of lobbyist contacts makes some sense. But focusing contact disclosure efforts on the lobbyists rather than the officials is likely to be more successful. Public officials may not always know whether the people with whom they are meeting are lobbyists. Indeed, in some cases, whether an individual is to be treated as a regulated lobbyist may vary across, or within, reporting periods depending on the extent of the individual’s lobbying activity. Public officials need not ordinarily maintain detailed logs of all their meetings. And enforcement of reporting requirements against public officials, including compliance with reporting time deadlines, is likely to be difficult. Registered lobbyists, by contrast, know who they are; likely already keep time logs in order to bill their clients; and already have to file periodic reports. Lobbying regulators are likely to be more vigorous in enforcing requirements against private lobbyists than public officials. Moreover, resistance to adopting contact disclosure is likely to be far greater if the disclosure has to be made by the lawmakers themselves instead of the lobbyists. The ABA Task Force Report recommends that registered lobbyists be required to report “all congressional offices, congressional committees,

²²⁵ Remarks by the President in State of the Union Address, <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>, Jan. 25, 2011.

²²⁶ Russell Berman and Kevin Bogardus, Obama’s Call for Disclosure of Lobbying Visits Falls Flat, *The Hill*, Jan. 26, 2011. Rep Darrell Issa (R-Cal), who chairs the House Committee in charge of government oversight contended that the President was being hypocritical, noting reports that White House officials met with lobbyists at nearby coffee shops to avoid their own disclosure rules. *Id.*

and federal agencies and offices contacted.”²²⁷ As the Report observes, such disclosure would directly serve the social interest in tracing the impact of lobbying on public decision-making.²²⁸

(2) Coalition lobbying. Some significant lobbying campaigns are undertaken by trade associations, coalitions, or umbrella organizations that act on behalf of a collection of businesses or interest groups with a stake in an issue. Traditional disclosure laws might require the organization formally undertaking the lobbying or hiring the lobbyist – or organized for the sole purpose of lobbying -- to disclose its actions, but would provide little information concerning the identity of the businesses, ideological groups, individuals, or other interests behind and financing the lobbying. The problem of obtaining adequate information about the groups actually responsible for lobbying is analogous to the increasingly salient campaign finance issue of spending by 501(c)(4) non-profit social welfare organizations and 501(c)(6) trade associations, which are required to disclose the fact and amount of their spending but not the identities of the individuals or firms supplying their funds. For both lobbying and campaign finance, the growing role of organizations with anodyne names that are specially created for electoral or legislative advocacy and do not disclose the sources of their funding or the amounts given to them undermines the goal of political transparency. HLOGA addresses this problem partially by require the disclosure of the identity of any organization that contributes more than \$5000 to a registered lobbyist or client in a quarterly period and also actively participates in the planning, supervision or control of the registrant’s lobbying activities. The United States Court of Appeals

²²⁷ ABA Task Force Report at 13.

²²⁸ Id. at 14. The ABA Task Force considered but declined to recommend that disclosure be extended to require the identification of specific individuals contact during a lobbying campaign on the grounds that “[t]he obligation to keep track of conversations with multiple staff members in a given office would be burdensome.” Id.

for the District of Columbia Circuit in *National Association of Manufacturers v. Taylor*²²⁹ sustained this enhanced disclosure requirement in the face of a host of First Amendment objections.

Coalition lobbying may also involve grassroots campaigns. In New York, which has experienced extensive grassroots lobbying by coalitions of organizations intending to influence state budget decisions, the legislature in 2012 enacted a bill proposed by Governor Andrew Cuomo requiring any organization that spends at least \$50,000 and three percent of its total expenditures on lobbying in a year to report the identity any donor that contributes at least \$5000 to the lobbying effort.²³⁰ One consequence of the law was that the Committee to Save New York, a business-backed coalition which was the highest spending lobbying group in New York in 2011 and 2012²³¹ and spent more than \$13 million to promote Governor Cuomo's agenda, "went dormant as soon as the state began requiring disclosure of donors."²³² By going beyond the disclosure of major donors actively involved in organizational lobbying decisions and seeking to reach all major donors, whether involved in an organization's lobbying efforts or not,

²²⁹ 582 F.3d 1 (D.C. Cir. 2009).

²³⁰ N.Y. Legislative Law, § 1-h(c)(4). The law provides an exemption for lobbying by all 501(c)(3) organizations for a 501(c)(4) organization "whose primary activities concern any area of public concern determined by the commission to create a substantial likelihood that application of this disclosure requirement would lead to harm, threats, harassment, or reprisals to a source of funding." Id. The exemption provision became controversial in the summer of 2013 when the Joint Committee on Public Ethics (JCOPE), the agency charged with administering the law, granted an exemption from financial source disclosure to Naral Pro-Choice New York, a prominent anti-abortion group, but not to any other group. Other groups focused on the abortion issue and on same-sex marriage and the NYCLU have also sought exemptions. See Thomas Kaplan, Nonprofits are Balking at Law on Disclosing Political Donors, N.Y. Times, Aug. 20, 2013, <http://www.nytimes.com/2013/08/21/nyregion/citing-safety-nonprofits-balk-at-law-on-disclosing-donors.html?page=wanted=all>. See also Jessica Alaimo, JCOPE delays action on request to shield donors, Capital New York, Oct. 29, 2013, <http://www.capitalnewyork.com/article/politics/2013/10/8535224/jcope-delays-action-requests-shield-donors>.

²³¹ See Thomas Kaplan, Pro-Cuomo Group Repeats as Top Spender on Lobbying, N.Y. Times, Mar. 28, 2103, <http://www.nytimes.com/2013/03/29/nyregion/committee-to-save-new-york-tops-2012-list-of-lobbying-spenders.html>.

²³² Kaplan, *supra*, Nonprofits are Balking.

the New York law may be pushing the edge of the constitutional envelope. But the law and the political context in which it emerged underscore the need for enhanced disclosure of the sources behind coalition lobbying.

VI. Conclusion

Although lobbying is often treated as a relatively recent phenomenon, its place in our representative system has been intensely debated by courts for nearly two centuries. For much of that time, the efforts of paid advocates to influence the legislative process were treated as tending to corrupt the republican form of government, yet even then many judges recognized that individuals, firms, and groups have legitimate interests in government action and that paid advocates can be appropriate intermediaries for seeking government decisions to advance those actions. Since the mid-twentieth century, the debate over the regulation of lobbying has been constitutionalized, with the Supreme Court grounding lobbying activity in the First Amendment's protections of speech, association, and petition. But even then, the courts have recognized that the dangers of hidden and unfair improper influence justify many regulations of lobbying particularly disclosure. Indeed, the concerns central to the nineteenth century critique of lobbying – secret contacts, provision of private pecuniary benefits, misuse of personal influence, special access – remain salient to contemporary lobbying laws and the constitutional issues they implicate.

Changes in lobbying practice raise new challenges for lobbying law. The increasing interpenetration of lobbying with candidate election finance on the one hand, and public relations campaigns on the other, have led for new calls (and some laws) that go beyond what the Supreme Court in the 1950s called “lobbying in its commonly accepted sense” to reach

lobbyists' involvement in campaign fundraising lawmakers and "grassroots" public advocacy communications. These and other current lobbying law disputes – such as the Obama administration's reverse revolving door rules – require consideration of whether lobbying poses a special danger of corruption or its appearance, what role special interests may legitimately play in the political process, and when is it appropriate to regulate, if only through disclosure, non-electoral political advocacy. The legal and regulatory balancing act of holding together First Amendment rights, controls on improper, and promoting government transparency may be more difficult than ever.

After nearly two centuries, the debate over whether and when lobbying is a corruptive form of special interest influence or an appropriate – indeed, constitutionally protected -- means of seeking to educate and influence government decision-making remains unresolved. It is likely to remain so for some time to come.